The Law Commission

Working Paper No. 116

Rape within Marriage

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This working paper, completed on 17 September 1990, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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Working Paper No. 116

Rape within Marriage

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THE LAW COMMISSION

WORKING PAPER NO. 116

RAPE WITHIN MARRIAGE

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PART I

INTRODUCTION

1.1 In this working paper the Law Commission reviews the rule of the common law that, except in certain particular circumstances, a husband cannot be convicted of raping his wife.

1.2 The rule appears to have had its origins in English law in an opinion of Hale CJ.[1] The rule has been assumed for more than two centuries to be part of English law and, as such, it was adopted as an accepted part of the criminal law by those overseas countries who based their legal systems on English law. However, the reasons that Hale put forward as the basis of such a rule are now almost universally dissented from;[2] and the rule itself, whatever other reasons may be advanced for its continuation, has been subject to increasing criticism in recent years. Thus, it has been abolished in Canada, New Zealand, Victoria, New South Wales, Western Australia, Queensland, Tasmania and in some states in the USA; in addition, the courts in Israel, Georgia and New York have declined to introduce the exemption into their law.[3]

1.3 In England and Wales the rule was considered by the Criminal Law Revision Committee ("the CLRC") in the course

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1. 1 PC 629 (1736); see para. 2.8 below.

2. See para. 4.2 below.

3. For details, see the account of the law of other countries set out in Appendix B to this paper.

of its Fifteenth Report, Sexual Offences.[4] The Committee recognised that there was a wide divergence of opinion on the main question of policy, namely, whether the offence of rape should apply generally between spouses.[5] It was of the view that a man should be liable to prosecution for rape when he has sexual intercourse with his wife without her consent when they are not cohabiting, but was divided as to whether the crime of rape should be further extended to all cases of non-consensual intercourse within marriage.

1.4 Since the CLRC reported, there has been increasing public concern about marital immunity in rape. Whereas until recently it was thought, on the basis of statements in institutional writers drawn from Hale, that the rule applied equally in Scotland as in England, the High Court in Scotland has recently severely criticised both the alleged basis of the rule and its justification as a matter of policy, and has held that the immunity of a husband from the law of rape forms no part of the law in Scotland.[6] Recent cases in England[7] have underlined the artificiality and complication caused by attempts to justify partial exceptions from the rule, whilst retaining the rule itself;[8] and these have caused further and extensive public criticism to be directed at the rule. Additionally, and more

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4. (1984), Cmnd. 9213.

5. Fifteenth Report, para. 2.55.

6. See Stallard v HM Advocate 1989 SCCR 248, discussed in detail in section 6 of Appendix B to this paper.

7. See in particular Henry, discussed in paras. 2.38-2.40 below, the trial judge's ruling in which case is reproduced in Appendix A to this paper; and R v R, discussed in para. 2.26 below, where the trial judge was severely critical of the stated justification for the rule.

8. See paras. 2.11-2.26 below.

generally, there has been in recent years increased public debate about the law of rape, and about the role of that law in the protection of women generally from non-consensual intercourse, which in turn has caused further questions to be raised about the continued justification of the exclusion from that law of cases where husbands have non-consensual intercourse with their wives.

1.5 In these new circumstances we have thought it right to reopen the issue that divided the CLRC. Amongst other considerations, we think it desirable to see whether, in the light of the developments in recent years mentioned above, the wide consultation and comment that we hope will be evoked by this working paper indicates a balance of opinion different from that which was put before the CLRC. We have also thought it right to discuss the rule in the context of the modern law of marriage and divorce; such issues are pursued in particular in paragraphs 4.3-4.42 of this working paper. We view these as important considerations, which we have gone into in more detail than was possible for the CLRC. We particularly hope to have assistance and comment on them, and on the paper generally, from persons concerned with family law and with wider issues affecting the family as well as from those concerned solely with the criminal law.

1.6 In this working paper, therefore, we have set out and reviewed all the evidence and arguments of which we are aware that relate to the marital immunity. It is right that we should say at the outset that, after that review, our provisional conclusion, explained in far more detail in Part IV of the paper, is that the present marital immunity in rape should be abolished. We give that indication now, not in order to foreclose debate or comment, but to assist those reading this paper to take a properly critical view of its contents. We are particularly anxious that those who take, or might be minded to take, a different view should put

before us any arguments that we have overlooked or undervalued, and in particular should draw attention to any empirical evidence, or any possible practical problems, that have not been properly dealt with in the paper.

1.7 The structure of this paper is as follows.

Part II: A review of the law concerning the issue of marital rape.

Part III: Summary of the Fifteenth Report of the Criminal Law Revision Committee and its treatment in the Commission's draft Code.

Part IV: The issues, including the grounds for the Commission's provisional conclusions.

Part V: Conclusions, including a review of possible steps short of complete abolition of the immunity.

Part VI: Summary of our provisional proposals and other specific matters on which comment is sought.

Appendix A comprises a transcript of a recent ruling by Mr Justice Auld,[9] which does not appear to have been reported; and in Appendix B we review the law of marital rape in other jurisdictions.

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9. Considered at paras. 2.38-2.40 below.

PART II

THE PRESENT LAW

A. THE LAW CONCERNING RAPE

1. Introduction

2.1 In this section we outline some general aspects of the law concerning rape. We should emphasise that we refer only to matters that bear on rape within marriage.[1]

2. The definition of rape

(a) The actus reus

2.2 Although rape is an offence of long standing, it was not defined by statute until the Sexual Offences (Amendment) Act 1976.[2] Section 1(1) of the Act defines the conduct prohibited by the offence as "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it". This definition, though declaratory of the modern common law, differs from the traditional common law definition, according to which rape consists in having "unlawful sexual intercourse with a woman without her

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1. For a full account of the law of rape, and of relevant related offences, see Smith and Hogan, Criminal Law, 6th ed. (1988), pp. 429-440, 446-451.

2. The Sexual Offences Act 1956, s. 1, provides that "it is an offence for a man to rape a woman", but contains no definition of the offence. The maximum sentence is life imprisonment (1956 Act, s. 37, Sch. 2).

consent, by force, fear or fraud".[3] We would emphasise, therefore, that although force commonly features in rape cases, and if used may provide cogent evidence of lack of consent, it is not an ingredient of the offence: the test is not "was the act against the victim's will?" but simply "was it without her consent?".[4]

2.3 Consent is nullified if given in response to a threat of immediate force against the woman (or, perhaps, against another person): clearly, for example, a woman who only at knife-point permits her assailant to have intercourse with her does not "consent" for this purpose.

2.4 The categories of threat that will nullify consent are not, however, clearly defined.[5] In Olugboja[6] the trial

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3. Co Litt 123 b; 2 Co Inst 180; 3 Co Inst 60; 4 Bl Comm 210; 1 Hawk, c. 41, s. 2; 1 Hale PC 627 et seq; 1 East PC 434. In the early stages of the criminal law the line between rape and abduction was not distinct: Pollock and Maitland, History of English Law, 2nd ed. (1968), 488-489. As Smith and Hogan, Criminal Law, 6th ed. (1988), p. 433, explain, "a subtle change of emphasis" occurred in the 19th century, in Camplin (1845) 1 Den 89, 169 ER 163 and Fletcher (1859) Bell CC 63, 169 ER 1168.

4. It is rape, for instance, to have intercourse with a woman who is asleep: Young (1878) 14 Cox CC 114.

5. The Court of Appeal stated in Olugboja (1981) 73 Cr App R 344 that juries should be directed to give "consent" its ordinary meaning but to distinguish it from submission. The distinction is criticised by Smith and Hogan, Criminal Law, 6th ed. (1988), p. 434; and by Professor Glanville Williams, who suggests (Textbook of Criminal Law, 2nd ed. (1983), pp. 551-2): "It is a purely verbal question whether [a serious threat to prevent the woman from offering resistance] should be regarded as one in which the woman consents under compulsion or as one in which she does not truly consent but simply gives submission, acquiescence or complaisance. However one expresses it, there is no effective consent in law."

6. (1981) 73 Cr App R 344.

judge directed the jury that if there were "any constraints" operating on the woman's will, they could find that the woman did not consent to intercourse. The Court of Appeal held that, while it would have been better had the judge not used the word "constraint", he had not misdirected the jury.[7]

2.5 In 1984 the CLRC recommended (by a majority) that the kinds of threat capable of nullifying consent should be specified in legislation. Such legislation, the CLRC proposed, should provide that threats of force against the woman or another person should nullify consent, but only if they were capable of being carried out immediately; other kinds of threat should be dealt with under the Sexual Offences Act 1956, section 2 (considered at paragraph 2.28 below), which should attract a maximum penalty of five (instead of, as at present, two) years' imprisonment.[8] A clause of this Commission's Draft Criminal Code[9] reflects this recommendation, though we indicated there that had the Commission considered the matter afresh, it might have gone further than the CLRC's recommendation.[10]

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7. At p. 351. Professor Glanville Williams suggests that the conviction was "procured and justified on grounds so woolly that we now seem no longer to have any firm bounds to the crime": Textbook of Criminal Law, 2nd ed. (1983), p. 553.

8. Fifteeenth Report, Sexual Offences, Cmnd. 9213, paras. 2.29, 2.111.

9. Law Com. No. 177 (1989), vol. 1, clause 89(2)(a). As to the Draft Code in general, see paras. 3.5-3.7 below.

10. Law Com. No. 177 (1989), vol. 2, para. 15.14, which states -

> "Although we have given effect to the [Criminal Law Revision] Committee's majority recommendation ... , some of us feel strongly that it is wrong to confine the threats which can negative consent in rape not only to those which the woman believes will be carried out 'immediately or before she can

2.6 For the purpose of some other sexual offences under the 1956 Act the word "unlawful" has been construed judicially as signifying "outside matrimony".[11] We are not aware, however, of any judicial suggestion that this construction applies to rape.[12]

(b) The mental element

2.7 The mental element of rape is that at the time of the intercourse the man either knows that the woman did not consent to it or "is reckless as to whether she consents to it".[13] A man is not reckless for this purpose if he believes (however unreasonably) that the woman is

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10. Continued
free herself' but also to threats to use force. The test ... might be stricter than the present law relating to rape. Moreover, it is not difficult to think of examples of equally potent threats which would destroy any real consent (probably under the present law), such as to abduct her baby without the use of force."

11. It has been so construed, e.g., for the purpose of the offence, under section 19(1) of the 1956 Act, of taking an unmarried girl under 18 out of the possession of her parent or guardian against his will with the intention that she should have "unlawful sexual intercourse with men or with a particular man": Chapman [1959] 1 QB 100.

12. Or of any case in which the point was argued. Judicial acceptance of this construction would overrule the decided cases (see paras. 2.11-2.26 below) which lay down that in certain circumstances a man can be convicted of rape committed on his wife. In Kowalski (1987) 86 Cr App R 339, 341, Ian Kennedy J, delivering the judgment of the Court of Appeal, in a glancing reference to the point suggested that arguably the immunity of a husband from conviction for marital rape was founded on the word "unlawful" in the statutory definition.

13. 1976 Act, s. 1(1)(b). The burden of proving this element of the offence (as well as that the accused had sexual intercourse with the complainant and the absence of her consent) is on the prosecution.

consenting; but if the jury "came to the conclusion that he could not care less whether she wanted to [have intercourse] or not, but pressed on regardless, then he would have been reckless and could not have believed that she wanted to, and they would find him guilty of reckless rape".[14] In relation to the question whether the accused believed that the woman was consenting, the jury have a statutory obligation to have regard, "in conjunction with other matters", to the presence or absence of reasonable grounds for his belief.[15]

B. RAPE WITHIN MARRIAGE: THE GENERAL RULE

2.8 It is generally accepted that, subject to exceptions (considered at paragraphs 2.12-2.26 below), a husband cannot be convicted of raping his wife. (We shall, for convenience, refer to this immunity from liability simply as the "immunity".) Indeed, there seems to be no recorded prosecution before 1949 of a husband for raping his wife.

2.9 The basis of the immunity is stated, in an oft-cited passage from Hale, to be that "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract";[16] and the

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14. Satnam S (1983) 78 Cr App R 149, 155. Similarly, in Morgan [1976] AC 182, 215C, Lord Hailsham of St Marylebone referred, in relation to recklessness, to an "intention of having intercourse willy-nilly not caring whether the victim consents or no."

15. 1976 Act, s. 1(2).

16. 1 PC 629. However, Hale cites no authority for the proposition; and Blackstone, who in his consideration of rape (Commentaries, vol. 4, pp. 209-215) refers to other statements of Hale, does not mention the immunity. What view Blackstone would have expressed, had he specifically addressed the existence of the immunity, is speculative. There is, though, perhaps some further indication that he did not share Hale's opinion. Immediately before his exposition of the law of rape, Blackstone (at pp. 207-208) considers the

courts have founded the exceptions to the immunity on the wife's subsequent revocation of this consent. (We shall refer to this fictional consent on the wife's part as her "deemed consent".)

2.10 Although the first reported prosecution of a husband for raping his wife took place in 1949,[17] the existence of the immunity arose indirectly for consideration in 1888, in Clarence.[18] Obiter, the question of rape by a man upon his

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16. Continued
statutory offence of forcible abduction and marriage ("vulgarly called 'stealing an heiress'"): "by statute 3 Hen. VII. c. 2. ... if any person shall for lucre take any woman ... [who has] substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer ...; such person ... shall be deemed [a principal felon]." Blackstone goes on to explain that, even if the woman originally consented to being taken away, "yet if she afterwards refuse to continue with the offender, and be forced against her will, she may, from that time, as properly be said to be taken against her will, as if she never had given any consent at all; for, till the force was put upon her, she was in her own power." Is it not conceivable that, by parity of reasoning, he would have concluded that there was no immunity for a husband, especially as (at p. 209) he subsequently introduces his discussion of the law of rape thus: "A third offence ... attended with greater aggravations than that of forcible marriage is the crime of rape, raptus mulierum, or the carnal knowledge of a woman forcibly and against her will"?

17. See para. 2.19 below.

18. 22 QBD 23. The point directly in issue concerned liability not for rape but for the offences, under ss. 20 and 47 of the Offences against the Persons Act 1861, of (respectively) inflicting grievous bodily harm and assault occasioning actual bodily harm. The accused knew, but his wife did not know, that he was suffering from a venereal disease. She submitted to intercourse, in consequence of which she contracted the disease. He was convicted of both offences; but by a majority of nine to four, the Court for Crown Cases Reserved quashed the convictions. (The judges in the majority were: Lord Coleridge CJ, Pollock and Huddlestone BB, Stephen, Manisty, Mathew, A L Smith, Wills and Grantham JJ; Field, Hawkins, Day and Charles JJ dissented.)

wife was considered,[19] and various views expressed -

1. Wills J (one of the majority judges) said -

   "If intercourse under the circumstances now in question constitutes an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority."[20]

2. The view of Field J (one of the dissenting judges) was that there might be "many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime."[21]

3. A L Smith J accepted the existence of the immunity, but apparently also accepted, in general terms, that the wife's deemed consent to intercourse could be revoked.[22]

4. Pollock B[23] and Stephen J[24] asserted the existence of the immunity without qualification, as did

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19. Though not by Lord Coleridge CJ.

20. 22 QBD 23, 33.

21. Ibid., at p. 57.

22. Ibid., at p. 37.

23. Ibid., at pp. 63, 64.

24. Ibid., at p. 46. Stephen J added that, in the first edition of his Digest of the Criminal Law, he had stated that in certain circumstances a man might be convicted of rape upon his wife, but that in the latest edition he had withdrawn the statement.

Hawkins J (though dissenting on the question of liability under the 1861 Act).[25]

C. EXCEPTIONS TO THE GENERAL RULE

2.11 The immunity has given rise to a substantial body of law about the particular cases in which the exemption does not apply. The limits of this law are difficult to state with certainty. Much of it rests on first-instance decisions which have never been comprehensively reviewed at appellate level. We have attempted to treat the matter as briefly as is consistent with accuracy.

1. Exceptions arising by reason of a court order

(a) The orders that may be made

2.12 By way of preliminary to a consideration of the exceptions to the immunity arising by reason of a court order, we first outline certain types of order that the court may make for the protection of the wife.

(i) The High Court and county courts

Judicial separation

2.13 On proof of any of the facts on which a divorce petition can be based, the court is bound to grant a decree of judicial separation, which provides that the petitioner be no longer bound to cohabit with her spouse, although (by contrast with its divorce jurisdiction) the court is not

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25. At p. 51.

concerned with the question whether the marriage has irretrievably broken down.[26]

Non-molestation orders

2.14 An application for a non-molestation order by one spouse against the other may be made (i) ancillary to other proceedings[27] (such as for divorce) or (ii) under the Domestic Violence and Matrimonial Proceedings Act 1976, section 1 of which empowers county courts to grant an injunction "restraining the other party to the marriage from molesting the applicant". The usual form of such orders is "to restrain the respondent from assaulting, molesting, or otherwise interfering with" the petitioner. Molestation need not include violence or the threat of violence.

Ouster orders

2.15 The court has power to make an ouster order (that is, excluding a spouse from the matrimonial home) (i) ancillary to other proceedings, (ii) under the 1976 Act and (iii) under the Matrimonial Homes Act 1983, which governs spouses' rights of occupation in the matrimonial home. However, it has been held by the House of Lords[28] that applications between spouses for such orders are governed by the principles in the 1983 Act.

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26. Matrimonial Causes Act 1973, s. 17. Such a decree does not, however, order the respondent to cease living with the petitioner; even if the wife has obtained a decree, the court will not automatically exclude the husband from the matrimonial home.

27. Supreme Court Act 1981, s. 37 and County Courts Act 1984, s. 38.

28. Richards v Richards [1984] AC 174.

(ii) Magistrates' courts

(Formerly) separation orders[29]

2.16 Before the Domestic Proceedings and Magistrates' Courts Act 1978, a wife could (on certain grounds) obtain an order from a magistrates' court containing a non-cohabitation clause - that is, one which provided that she was no longer bound to cohabit with the husband (and which had the same effect as a decree of judicial separation).[30]

Personal protection orders[31]

2.17 The 1978 Act abolished separation orders. Instead, magistrates' courts were given power under section 16(2) of the Act to grant an order upon the application of either party to a marriage that "the respondent shall not use, or threaten to use, violence against the person of the applicant",[32] provided that the court is satisfied that the respondent has already used or threatened to use such violence and that the order is necessary for the protection of the applicant.[33] Thus, a personal protection order can

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29. This is how such orders were commonly known, although the term did not appear in the legislation; separation orders containing a non-cohabitation clause should be distinguished from orders dealing only with maintenance and/or custody of the children.

30. Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(a), replacing previous legislation.

31. This term is convenient, though not used in the 1978 Act.

32. Or against the person of a child of the family.

33. Or a child of the family.

only be made to protect the applicant from violence or the threat of violence and not from "molestation".[34]

Exclusion orders

2.18 A magistrates' court has power to make orders excluding one spouse from the matrimonial home under section 16(3) of the 1978 Act.[35] The grounds are similar to but more restricted than those for personal protection orders.

(b) The effect of a court order

2.19 In Clarke (1949),[36] the first reported prosecution of a husband for raping his wife, an order had been made by the justices which provided that the wife should no longer be bound to cohabit with her husband. Byrne J held that the wife's deemed consent to intercourse had been revoked by the order.[37] He reasoned as follows -

> "... the marital right of the husband [to sexual intercourse] exists by virtue of the consent given by the wife at the time of the marriage and not by virtue of a consent given at the time of each act of intercourse, as is the case with unmarried persons. The intercourse between husband and wife is, therefore, not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage. ... The position ... [in the present case] was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract existed

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34. Horner v Horner [1982] Fam 90.

35. The court must be satisfied that the respondent has used violence against the wife (or child) or, in certain circumstances, that he has threatened such violence.

36. 33 Cr App R 216.

37. As, equally, it would have been by a decree of judicial separation: 33 Cr App R 216, 218.

between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked, and thereafter ... the prisoner was not entitled to have intercourse with her without her consent."[38]

2.20 Since Clarke, certain further categories of order or decree (though not the mere initiation of proceedings for an order or decree[39]) have been held to revoke the wife's consent. They include -

(1). A decree nisi of divorce, on the ground that "between the pronouncement of a decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality".[40]

(2). An injunction restraining the husband from molesting his wife or an undertaking given by him to the court that he will not molest her.[41]

2.21 In Steele,[42] Geoffrey Lane LJ, delivering the judgment of the Court of Appeal, reviewed the authorities. He went on to enunciate the law as follows -

"The question which the Court has to decide is this. Have the parties made it clear, by agreement between themselves, or has the Court made it clear by an order

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38. 33 Cr App R 216, 217-218.

39. Miller [1954] 2 QB 282 (petition for divorce), a decision of Lynskey J, who observed, at p. 290: "The petition might be rejected and in that event ... the marriage would still be subsisting and consent to marital intercourse as given in the marriage contract still be unrevoked." This approach was endorsed by the Court of Appeal in Steele (1976) 65 Cr App R 22, 24.

40. O'Brien [1974] 3 All ER 663, 665 (Park J).

41. Steele (1976) 65 Cr App R 22 (CA).

42. (1976) 65 Cr App R 22, 25.

or something equivalent to an order, that the wife's consent to sexual intercourse with her husband implicit in the act of marriage, no longer exists? A separation agreement with a non-cohabitation clause, a decree of divorce, a decree of judicial separation, a separation order in the justices' court containing a non-cohabitation clause and an injunction restraining the husband from molesting the wife or having sexual intercourse with her are all obvious cases in which the wife's consent would be successfully revoked. On the other hand, the mere filing of a petition for divorce would clearly not be enough, the mere issue of proceedings leading up to a magistrates' separation order or the mere issue of proceedings as a preliminary to apply for an ex parte injunction to restrain the husband would not be enough but the granting of an injunction to restrain the husband would be enough because the Court is making an order wholly inconsistent with the wife's consent and an order ... breach of which would or might result in the husband being punished by imprisonment."

2.22 Despite this clear statement, further discussion of the law as stated in paragraph 2.20(2) above is necessary, since later cases have introduced some uncertainties. The facts of Roberts[43] were that the wife obtained a non-molestation order limited to two months. At the same time an ouster order was made, ordering the husband out of the matrimonial home.[44] On the same day the parties entered into a deed of separation, which though reciting that the husband and wife had agreed to live apart, contained neither a non-cohabitation clause nor a non-molestation clause. Delivering the judgment of the Court, O'Connor LJ cited the passage from the Court of Appeal's judgment in Steele set out at paragraph 2.21 above. He went on to reject the argument that, when the non-molestation order expired, the

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43. [1986] Crim LR 188. (This paragraph in the text is based on the transcript of the judgment, 7 November 1985, No. 2660/C/85.)

44. The report does not indicate for what period the ouster order was made, but it is perhaps unlikely that it was for longer than the non-molestation order.

wife's consent to intercourse, "which had been without doubt terminated, suddenly revived". The Court did not state in terms that in every case the making of a non-molestation order would operate to preclude the immunity after the expiry of the period for which the order was in force, as well as during that period: the Court simply found that on the facts the expiry of the order did not revive the wife's deemed consent to intercourse. However, on a strict application of Steele, it is difficult to see what other facts were in point, as the separation agreement contained no non-cohabitation or non-molestation clause.[45]

2.23 There is, however, some doubt about the exact effect of at least personal protection orders. In Sharples[46] a personal protection order was made by justices; its terms were that the husband should not "use or threaten violence against the person of the [wife]". The parties continued to reside at the matrimonial home, but sexual relations (which had ceased some months before the making of the order) were not resumed. Some six weeks after the order the husband had sexual intercourse with the wife without her consent. At the husband's trial for rape, the judge ruled that the justices' order did not operate to revoke the immunity. He concluded that an order that the husband should not use violence against the wife did not necessarily give rise to the inference that she had withdrawn her consent to

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45. It might be thought that, as a matter of logic, since the immunity is revoked solely by the making of a (non-molestation) order, the immunity must automatically revive when the order expires. Perhaps the approach in Roberts is founded, however, on the ground that the wife's deemed consent is given once only, at the date of the marriage; and that, accordingly, the revocation of such consent definitively ends the fiction on which it is based.

46. [1990] Crim LR 198; 6 December 1989, Transcript No. S/2505. (Manchester Crown Court, His Honour Judge Fawcus.)

intercourse; it was possible, the judge observed, for a wife to seek an order against violence but continue to have sexual relations with her husband.

2. Exceptions where no court order has been made

2.24 There is no conclusive authority on the position if the parties are living apart but no order or decree has been made. Two situations may be distinguished: first, where the parties have agreed to live apart; and second, where the parties are in fact living apart because the wife has withdrawn from cohabitation. In the one case, the husband has relieved the wife from her duty to live with him, whereas in the other he has not. Until recently, the possibility that an agreement to live apart removed the immunity appears to have been considered only in connection with formal, written separation agreements. Referring to (presumably written) agreements, Lynskey J observed, obiter, in 1954 that the wife's consent would be revoked by an agreement to separate, "particularly if it [contains] a non-molestation clause";[47] and in 1976 Geoffrey Lane LJ, delivering the judgment of the Court of Appeal, stated (again, obiter) that "a separation agreement with a non-cohabitation clause" would have that effect.[48]

2.25 To base the revocation of the immunity on the existence of a separation agreement with a non-cohabitation clause may be thought to present difficulties. First, it is

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47. Miller [1954] 2 QB 282, 290.

48. Steele (1976) 65 Cr App R 22, 25. The expression "a separation agreement with a non-cohabitation clause" is not (as may perhaps be thought) tautologous. A separation agreement may deal with such matters as maintenance and rights in the matrimonial home, and contain no clause whereby the parties agree to live apart (and no non-molestation clause).

doubtful whether it is consistent with the theoretical basis of the immunity itself. Byrne J explained in Clarke[49] that the deemed consent of the wife to intercourse is created, and in certain cases revoked by, the law, irrespective of the parties' intentions. This approach seems inconsistent with revocation of the consent by agreement. Second, however, it was not clear how far, if at all, an informal agreement to separate should remove the immunity. Whilst to insist on writing might appear excessively formalistic, there may be difficulty in determining the exact terms of an informal agreement - for instance, the period for which it is to last, or whether the parties have agreed not only to live apart but also to abandon sexual relations.

2.26 This question was taken up in R v R, which concerned a charge of attempted rape (Leicester Crown Court, 30 July 1990). In that case, the accused's wife left the matrimonial home, allegedly because of her unwillingness, on medical advice, to submit to intercourse, and went to live with her parents; the husband told her that he proposed to obtain a divorce; and she then consulted solicitors with a view to initiating divorce proceedings herself. Some three weeks later the husband broke into her parents' house and attempted to have intercourse with her against her will. Owen J ruled that an agreement between the parties sufficed to revoke the immunity: such agreement need not be in writing and, moreover, as in the case before him, it might be implied from the parties' conduct. It would seem, however, that the agreement must (as in the instant case) be to live apart, and not merely to refrain from intercourse. Owen J further ruled that even in the absence of such an agreement, the withdrawal from cohabitation of either party, accompanied by a clear indication that consent to sexual intercourse had been terminated, amounted to a revocation of

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49. See para. 2.19 above.

consent sufficient to exclude the immunity. This view is, however, difficult to reconcile with the approach in Steele[50] that filing a divorce petition was "clearly" not enough. The ruling in R v R appears substantially to extend what had previously been thought to be the law, although it emphasises that factual separation, and not merely revocation of consent to intercourse, is necessary to remove the immunity.

D. RELATED OFFENCES[51]

1. The offences in question

(a) Indecent assault

2.27 It is an offence to "make an indecent assault on a woman".[52] The term "assault" comprehends both a battery[53] and an assault in the narrow sense.[54] Subject to immaterial

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50. (1976) 65 Cr App R 22, 25, cited at para. 2.21 above.

51. We are not concerned in the present context with the question that arose directly for decision in Clarence (1888) 22 QBD 23 (see para. 2.10 above) - namely, whether a husband who, knowing that he has a disease, infects his unknowing wife in consequence of consensual intercourse with her commits an offence under s. 20 or s. 47 of the Offences against the Person Act 1861.

52. 1956 Act, s. 14(1). The offence carries a maximum sentence of 10 years' imprisonment: 1956 Act, s. 37, Second Schedule, para. 17(i), as amended by the Sexual Offences Act 1985, s. 3.

53. i.e., an act by which a person intentionally or recklessly inflicts unlawful personal violence upon another.

54. i.e., an act by which a person intentionally or recklessly causes another to apprehend immediate unlawful personal violence. Thus, e.g., when a man who while indecently exposing himself walked towards a woman, making an indecent suggestion to her, "it was as clear as it could be" that he was guilty of indecent assault: Rolfe (1952) 36 Cr App R 4, 5-6 (per Lord Goddard CJ).

exceptions (relating to, among other matters,[55] assaults on children or mental defectives), consent negatives an assault. By contrast with rape, a husband enjoys no immunity from conviction for an indecent assault committed upon his wife. This gave rise to the view that a man who had non-consensual intercourse with his wife could be convicted of indecent assault. Recently, however, doubt has been cast on the matter.[56]

(b) Procurement of woman to have sexual intercourse by (i) threats or (ii) false pretences

2.28 Section 2(1) of the Sexual Offences Act 1956 provides that it is an offence [57] "to procure a woman, by threats or intimidation, to have unlawful sexual intercourse anywhere in the world"; and section 3(1) of the Act creates a similar offence, relating to procuration by "false pretences or false representations".[58] The maximum sentence for either offence is 2 years' imprisonment; and either may be committed by the procurer himself.[59] The term "unlawful" would appear to exclude marital intercourse.[60]

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55. A person cannot validly consent to the intentional infliction of any degree of bodily harm unless the action is justifiable on the ground of some public interest: Donovan [1934] 2 KB 498; Attorney-General's Reference (No. 6 of 1980) [1981] QB 715.

56. See paras. 2.38-2.40 below.

57. 1956 Act, s. 37, Second Schedule, Part I, paras. 7(a) and 8.

58. Williams (1898) 62 JP 310. There is a statutory corroboration requirement (1956 Act, s. 2(2)), which we have provisionally proposed should be abolished: Working Paper No. 115 (1990), para. 4.41.

59. Williams (1898) 62 JP 310.

60. See para. 2.6 above.

(c) Administering drugs

2.29 It is an offence under section 4(1) of the 1956 Act to administer drugs to a woman in order to procure or facilitate "unlawful sexual intercourse" with her.[61] Here again, the requirement that the intercourse be "unlawful" would appear to preclude a conviction based on an intent to procure intercourse with the woman's husband.[62]

(d) Attempted rape[63]

2.30 A man is guilty of attempted rape if, with intent to commit rape, he "does an act which is more than merely preparatory" to the commission of rape.[64] Formerly it was uncertain whether recklessness as to the absence of the woman's consent would suffice for an attempt;[65] but it has

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61. More fully, the offence consists in applying or administering to, or causing to be taken by, a woman "any drug, matter or thing with intent to stupefy or overpower her so as thereby to enable any man" to have intercourse with her. By contrast with the offences under ss. 2 and 3, it is not necessary that intercourse should take place. The offence carries a maximum sentence of 2 years' imprisonment.

62. See para. 2.6 above.

63. In logic, a man cannot be convicted of attempting to rape his wife (or of assault, or burglary, with intent to rape her: see paras. 2.31-2.32 below) in circumstances in which, had he achieved his aim, he would be immune from conviction for rape.

64. Criminal Attempts Act 1981, s. 1. The maximum sentence, as for the complete offence, is life imprisonment: 1956 Act, s. 37, Second Schedule, para. 1(b), as amended by the Sexual Offences Act 1985, s. 3(2). It should be borne in mind, however, that the slightest penetration of the woman constitutes the completed offence: s. 44 of the 1956 Act, extended to rape by the 1976 Act, s. 7(2).

65. The doubt arose from the expression "with intent to commit an offence" in s. 1 of the 1981 Act.

now been held that the mental element for the attempt is the same as that for the completed offence - namely, an intention to have intercourse combined with either (i) knowledge that the woman was not consenting or (ii) recklessness as to the matter.[66]

(e) Assault with intent to rape

2.31 It is possible that the common law offence of assault with intent to commit rape, which undoubtedly existed in the first half of the nineteenth century,[67] is extant: there have recently been conflicting decisions at first instance.[68]

(f) Burglary

2.32 A man who enters a building (or part of one) as a trespasser, knowing that he is a trespasser or being reckless as to the matter,[69] with the intent of committing rape there is guilty of burglary.[70]

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66. Khan [1990] 1 WLR 813 (CA).

67. e.g., Gisson (1847) 2 C & K 781, 175 ER 327.

68. In Lionel (1982) 4 Cr App R (S) 291 a sentence of imprisonment was imposed for the offence, to run consecutively to a larger sentence for rape. On appeal against sentence it was not suggested that the offence no longer existed; and in R v J (1986), unreported, Turner J held that it did. However, in White [1988] Crim LR 434 and in R v P [1990] Crim LR 323, Judge Harkins and Pill J respectively ruled to the contrary. Professor John Smith considers the question in detail (it involves examination of certain statutory provisions) in [1990] Crim LR 325, concluding (at p. 326) that "the better opinion" may be that the offence survives.

69. Collins [1973] QB 100.

70. Theft Act 1968, s. 9. The maximum sentence is 14 years' imprisonment: s. 9(4). If he is carrying an offensive weapon (including a real or imitation

2. The availability of related offences in relation to the immunity

2.33 Two distinct issues have arisen before the courts. The first concerns the ambit of the wife's deemed consent to intercourse: does that consent extend to acts of a sexual nature which are "collateral" to intercourse? The Court of Appeal, overruling a previous decision at first instance, has ruled that the answer is no. The second question is whether the act of intercourse, and acts necessarily preliminary to the act of intercourse, may constitute an offence other than rape.

(a) "Collateral" acts

2.34 In Kowalski[71] the Court of Appeal held that a husband who compelled his wife to perform fellatio on him was guilty of indecent assault, on the ground that the wife's deemed consent to sexual intercourse did not extend to such conduct: it was immaterial (i) whether the fellatio was undertaken as act preliminary to sexual intercourse or as an end in itself and (ii) whether or not she had previously performed it voluntarily.[72]

2.35 In arriving at its conclusion, the Court overruled Caswell.[73] In that case, the accused, who was living apart from his wife, forced her to perform fellatio (which

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70. Continued
firearm) or explosive, he is guilty of "aggravated burglary" under s. 10 of the Act, which offence carries a maximum sentence of life imprisonment.

71. (1987) 86 Cr App R 339 (CA).

72. See further, para. 4.22 below.

73. [1984] Crim LR 111 (Wakefield Crown Court).

activity they had performed during cohabitation). He then raped her. The trial judge upheld a defence submission that a charge of indecent assault would not lie, on the ground that the wife's deemed consent to intercourse extended to a lesser sexual act, and that it was not practicable to draw a line between "acceptable" acts and those which could be treated as indecent.[74]

(b) The act of intercourse, and acts necessarily preliminary to intercourse

2.36 Until recently the general view appears to have been that, in the words of the CLRC -

> "Although the offence of rape cannot occur between cohabiting spouses, there are other offences that may be charged where a man has sexual intercourse with his wife without her consent, such as assault, or, where harm is caused, assault occasioning actual bodily harm or the causing or inflicting of grievous bodily harm."[75]

The logic of this approach did not escape academic criticism.[76]

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74. The judge held, however, that a charge of common assault could be founded on the same facts. (The prosecution agreed that, even in relation to such charge, a corroboration warning was required in respect of her evidence - presumably because the offence was of a sexual nature.)

75. Fifteenth Report (1984), para. 2.58. (Footnote omitted.)

76. e.g., Honoré, Sex Law (1978), p. 22, suggested that the distinction "must mark the summit of the English disregard for logic"; Glanville Williams, Textbook of Criminal Law, 2nd ed. (1983), p. 237, commented that the law was inconsistent with itself, "for if the rule for rape rests on the irrevocability of the wife's consent to sexual intercourse, it is illogical to treat the same act as an assault."

2.37 The view referred to in the preceding paragraph was founded on Miller,[77] a decision of Lynskey J, who explained that -

> "... although the husband has a right to marital intercourse, and the wife cannot refuse her consent, and although if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence in the exercise of that right, and if he does so he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case warrant. If he should wound her he might be charged with wounding or causing bodily harm, or he may be liable to be convicted of common assault."[78]

In that case the prosecution alleged that the husband had thrown his wife down three times before having intercourse with her, and that she was subsequently in a hysterical and nervous state. Rejecting the argument that the husband was entitled to use reasonable force for the purpose of exercising his right to marital intercourse,[79] Lynskey J ruled that the jury could convict him of assault causing actual bodily harm (or of common assault).[80]

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77. [1954] 2 QB 282.

78. [1954] 2 QB 282, 291-292.

79. [1954] QB 282, 291. Lynskey J was influenced by Jackson [1891] 1 QB 671 (CA), in which it was held, on the hearing of a successful habeas corpus application by a wife, that the husband, who had obtained an order for restitution of conjugal rights, was not entitled to confine her to his house against her wishes. The implications of this case for the modern nature of marriage are further considered at para. 4.7 below.

80. Lynskey J held that a hysterical and nervous condition was capable of constituting "actual bodily harm": [1954] 2 QB 282, 292. (The jury convicted the husband of common assault.)

2.38 Recently, however, in Henry, Auld J, in a closely reasoned ruling[81] (in which he reviewed the authorities and considered opinions on them expressed by academic commentators[82]), has departed from the traditional view. In the case before him, the husband "simply" raped[83] the wife (who was living apart from him and had commenced divorce proceedings). He was charged with indecent assault, affray and false imprisonment, but not with rape.[84] Auld J ruled that none of the charges would lie. He concluded that the rape immunity applied so as to exclude from the ambit of indecent assault not only the act of intercourse but also "acts proximate to and part of the preparation for that act itself"; nor could such acts constitute a common assault.[85] The learned judge ruled, further, that the affray charge was unsustainable because the force used to achieve intercourse was not unlawful; and he held that the offence of false imprisonment (which, it was argued, arose from the husband lying on top of his wife to restrain her)

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81. 14 March 1990, Central Criminal Court. A transcript of the ruling appears as Appendix A to this paper.

82. By Professor John Smith in particular.

83. The husband forced his way into the wife's house, and when they were sitting on a mattress on the floor, he pulled her down, lay on her and penetrated her; the wife, though making plain that she was not consenting, did not struggle or resist physically.

84. It should be noted that if the ruling of Owen J in R v R (para. 2.26 above) is followed, facts similar to those in Henry might in future found a charge of rape. Auld J was not invited to consider this issue. His ruling is however an important exposition of the effect on other crimes of the availability of the immunity, irrespective of the range of cases to which, in law, the immunity eventually proves to extend.

85. On the ground that the husband's acts of pulling the wife down from a sitting position on the mattress and lying on her to have intercourse fell "well within the line of deemed consent": Appendix A, para. 22.

was not available, because the act of intercourse was not unlawful.[86]

2.39 Auld J distinguished Miller,[87] in which, he explained, much greater force had been used and there had been an allegation of actual bodily harm.[88]

2.40 More generally, Auld J pinpointed the dilemma in which the immunity placed the courts -

> "[T]he problem lies in drawing the line between the act of forced intercourse to which the wife is deemed to consent and some assault over and above that to which she is not deemed to consent. That line cannot be identified by saying that only force in excess of that necessary to achieve the act of intercourse is chargeable as an assault. That is because the degree of force used and the injuries inflicted are in the main likely to depend upon the degree of resistance put up by the wife. However, there is a line to be drawn, however low in the scale of force used by the husband for the purpose, because of her deemed consent to her will being overborne."[89]

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86. Auld J expressed the wish for guidance from higher authority, and observed that the continuing existence of the immunity, which many regarded as unsatisfactory and unjust, was "a matter for serious debate by those responsible for making or changing the law": Appendix A, paras. 6 and 7.

87. [1954] 2 QB 282.

88. Appendix A, para. 21.

89. Appendix A, para. 19. It may be relevant that under the general criminal law there are limits to the right to consent to the infliction of physical harm on oneself. At one time, it was thought that consent was vitiated only in respect of death or grievous bodily harm; but since Attorney-General's Reference (No. 6 of 1980) [1981] QB 715 an act intended to cause and causing actual bodily harm will be an assault even if consented to, unless the act can be justified as involving the exercise of a lawful right (as in the case of lawful chastisement or correction) or as needed in the public interest.

1. The compellability of the wife as a witness for the prosecution

2.41 The law governing the question whether the accused's wife (or husband) can be compelled to give evidence for the prosecution is set out in section 80(3) of the Police and Criminal Evidence Act 1984, which provides that, in general, she is not compellable; but the subsection contains exceptions, one of which applies if "the offence charged involves an assault on, or injury or a threat of injury to, the wife ... of the accused". It could be argued that any rape "involves an assault". In our view, however, it is not sufficiently clear that the draftsman intended the expression to extend to rape to be able to say with complete confidence that the exception renders the wife a compellable witness for the prosecution on a charge of marital rape.

2. Anonymity

(a) The complainant

2.42 The courts have a limited common law power to make orders prohibiting publication of the identity of witnesses, but only on the ground that publicly to reveal that information would be prejudicial to the due administration of justice. It is doubtful whether this power, which is commonly used at blackmail trials, extends to the victim in rape cases.[90]

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90. R v Socialist Worker Printers and Publishers Limited, ex parte Attorney-General [1975] QB 637, 652G-653B (per Lord Widgery CJ).

2.43 In 1975 an Advisory Group on the Law of Rape, under the chairmanship of Mrs Justice Heilbron, recommended that the complainant in a rape case should be and remain anonymous, subject to a dispensing power of the judge where, exceptionally, publication of the complainant's identity was essential for the discovery of potential witnesses; and that breach of anonymity should be an offence.[91] The Group's reasoning was (in summary) that rape was, like blackmail, a special offence; that public knowledge of the indignity suffered by a woman who had been raped might be "extremely distressing and even positively harmful", an effect which would be aggravated by an acquittal; and that the risk of such public knowledge could operate, therefore, as a severe deterrent to her bringing proceedings.[92]

2.44 This recommendation was implemented by section 4 of the Sexual Offences (Amendment) Act 1976. Amendments were made in 1988.[93] The section, which applies in relation to a "rape offence",[94] prohibits the written publication or broadcasting of material likely to lead members of the public to identify the complainant in a rape case.[95] A

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91. In its Report, Cmnd. 6352, paras. 163-166 and 173-174.

92. Para. 153. The Group accepted that a rape complaint might be unfounded and the woman malicious or a false witness, but concluded that the "greater public interest" lay in protecting her anonymity. The Group's opinion was that generally the humiliation of the complainant was nothing like as severe in other criminal trials (para. 157).

93. Criminal Justice Act 1988, s. 158.

94. Namely: rape; attempted rape; aiding, abetting, counselling and procuring rape or attempted rape; incitement to rape; and (added by the 1988 Act, s. 158(6)) conspiracy to rape and burglary with intent to rape: 1976 Act, s. 7(2).

95. Sect. 4(1). The judge has power to direct that the prohibition should not apply if he is satisfied (i) that a direction is required to induce potential

breach of the prohibition is an offence, punishable by a fine of up to £2,000. As originally enacted, the section contained no provision for permitting publication with the consent of the complainant; but one of the amendments made in 1988 introduced a defence that she had consented in writing to publication.[96]

(b) The accused

2.45 The Heilbron Group considered whether the accused should be protected by anonymity in rape cases but concluded that it would be anomalous to create an exception, limited to rape, to the general rule that defendants were named; they explained that the reasoning which had led them to their recommendation that complainants in rape cases should be anonymous did not apply to defendants.[97] Contrary to this view, however, section 6 of the 1976 Act contained provisions protecting the anonymity of a man charged with rape which were broadly similar to section 4, save that (i) his protection ceased on conviction and (ii) the court was bound to accede to an application on his part to lift the prohibition. In 1984, however, the Criminal Law Revision Committee endorsed the conclusion of the Heilbron

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95. Continued
witnesses to come forward and (ii) that without the direction the accused is likely to be substantially prejudiced: s. 4(2). The judge also has power to lift the prohibition to the extent that it imposes a substantial and unreasonable restriction on reporting the trial if it is in the public interest to remove or relax the restriction; but he cannot exercise that power by reason only of the outcome of the trial: s. 4(3).

96. The defence is not available if consent was intentionally obtained by unreasonably interfering "with the woman's peace or comfort": s. 4(5A) and 4(5B), inserted by the 1988 Act, s. 158(3).

97. Paras. 175-177.

Group;[98] and the provision was repealed by the Criminal Justice Act 1988.[99]

98. Fifteenth Report, para. 2.92.

99. Sect. 158(5); s. 170 and Sch. 16.

PART III

THE VIEWS OF THE CRIMINAL LAW REVISION COMMITTEE; THE DRAFT CRIMINAL CODE

A. THE VIEWS OF THE CRIMINAL LAW REVISION COMMITTEE

3.1 In 1980 the Criminal Law Revision Committee published a working paper on sexual offences. "In accordance with our usual practice", the CLRC explained at the outset,[1] comments had been invited

> "from members of the Appellate Committee of the House of Lords, the judges of the Supreme Court and from interested bodies and others who were likely to help us in our task. We allowed them a substantial period in which to submit observations, and received a large number of replies."

3.2 The working paper included a detailed discussion of marital rape,[2] on which the CLRC was divided. The majority proposed (i) the abolition of the immunity but (ii) that the consent of the Director of Public Prosecutions should be a pre-requisite of the prosecution of a husband for rape committed upon his wife.[3]

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1. Para. 2.

2. Paras. 28-43.

3. Paras. 37, 42. Provisions of this kind were originally designed for the purpose, among others, of securing uniformity of practice between the then considerable number of prosecuting authorities. The DPP's consent to prosecution can now be given by a Crown Prosecutor under the Prosecution of Offences Act 1985 (s. 1(7)), which established the Crown Prosecution Service. Since (subject to immaterial exceptions) that Service is responsible for all public prosecutions, the only effect of the requirement would be to preclude a private prosecution.

3.3 In its final report,[4] however, the CLRC adopted a different approach. Having presented at some length the arguments for and against the complete abolition of the immunity,[5] the Committee concluded that -

(i) The exceptions to the immunity under the existing law should be retained.

(ii) In principle, the exceptions to the immunity should be extended to every case where husband and wife were no longer cohabiting.

(iii) There were, however, difficulties in defining cohabitation; and any definition would involve an investigation of the parties' domestic circumstances, an exercise which some members considered unsuitable for a criminal trial.

(iv) In view of the difficulties referred to in (iii): (a) a narrow majority of the CLRC favoured leaving the law as it was, whereas (b) the other members favoured the complete removal of the immunity, as did a majority of the Policy Advisory Committee.[6]

3.4 The CLRC added -

"Although all of us are in principle favourably inclined to an amendment of the law to enable a prosecution to be brought for rape where a married couple were not cohabiting at the time of the offence, we are acutely conscious of the difficulties in achieving a satisfactory definition. Nevertheless, we recommend that an attempt be made to find a workable formula. Furthermore, some possibility of uncertainty should not be a final barrier here to a reform that all of us regard as desirable."[7]

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4. Fifteenth Report (1984), Cmnd. 9213.

5. Paras. 2.55-2.85.

6. Paras. 2.55-2.56.

7. Para. 2.85.

B. THE DRAFT CRIMINAL CODE

3.5 The Draft Criminal Code incorporated recommendations for the reform of the law made in recent years by certain official bodies, including the CLRC.[8] The Law Commission made clear in its Report on the Code that inclusion of the recommendations made by other Committees implied neither assent nor dissent.[9] The Commission placed particular emphasis on this point in relation to sexual offences;[10] and as to marital rape, the Draft Code purported to give effect to the CLRC's recommendations in its Fifteenth Report (which are outlined above[11]). The subject was dealt with by clause 87, the material part of which provided that references to "sexual intercourse" were references only to -

> "(a) sexual intercourse between a man and a woman who are not husband and wife; or
>
> "(b) sexual intercourse between husband and wife when -
>
> (i) a decree of divorce or nullity or a judicial separation order in respect of the marriage subsists; or
>
> (ii) an injunction granted by a court that the husband shall not, or an undertaking given by him to a court that he will not, molest his wife is in force; or
>
> (iii) an injunction granted, or order made, by a court that the husband shall, or an undertaking by him to a court that he will, leave the matrimonial home or not return to it is in force; or

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8. Law Com. No. 177, vol. 1, para. 3.34.

9. Ibid.

10. As to which the Commission "recognised that ... opinions as to what conduct should be criminal are likely to differ": Law Com. No. 177, vol. 2, para. 15.2.

11. Para. 3.3.

(iv) an order made by a magistrates' court under section 16(2) of the Domestic Proceedings and Magistrates' Courts Act 1978 is in force;[12] or

(v) a deed of separation executed by them is in force; or

(vi) they are not living with each other in the same household."

3.6 As to subparagraph (vi), the Commentary on the Draft Code explained that -

> "The Committee [i.e., the CLRC], though much divided on the question of marital rape,[13] were unanimous that rape should be extended to the case of a husband and wife who are not cohabiting.[14] They considered various formulae including that in section 2(6) of the Matrimonial Causes Act 1973 - 'a husband and wife shall be treated as living apart unless they are living with each other in the same household.' The Committee found difficulties with every formula and it is, of course, true that no form of words will provide a clear-cut answer to the question in all circumstances. This, however, is not uncommon in the law, even the criminal law, and we believe that the language of section 2(6) provides a workable test. It is accordingly adopted in paragraph (b) (vi)."[15]

3.7 Finally, the Commentary that accompanied the Code explained that the word "unlawful" in the existing definition of rape had been dropped

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12. Since the publication of the Draft Code, it has been held that the making of such an order does not necessarily revoke the immunity: see para. 2.23 above. (Footnote added.)

13. We stress that, if we had been charged with formulating the policy for the reform of the law on this issue, it is unlikely that our recommendation would have been the same as that of the Committee. (Footnote in original.)

14. Fifteenth Report, para. 2.85, Recommendation 10. (Footnote in original.)

15. Law Com. No. 177, vol. 2, para. 15.8.

"because to include it might have given an appearance to the definition at odds with reality. Paragraph (a) states the accepted meaning of the expression in current legislation while paragraph (b), (i) (ii) and (v) states the circumstances in which sexual intercourse between husband and wife is at present 'unlawful' for the purposes of the law of rape. Sub-paragraphs (iii) and (iv) may also represent the present law."[16]

16. Law Com. No. 177, vol. 2, para. 15.8. The significance of the word "unlawful" in relation to rape has been considered at para. 2.6 above.

PART IV

THE ISSUES

A. INTRODUCTION

1. The basis of the present law

4.1 The present enquiry is unusual in one important respect. It is usual practice, when considering the reform of common law rules, to consider the grounds expressed in the cases or other authorities for the present state of the law, in order to analyse whether those grounds are well-founded. However, that step is of little assistance in the present case, partly because there is relatively little case law on the subject but principally because there is little dispute that the reason set out in the authorities for the present state of the law cannot be supported.

4.2 The stated basis of the present law is that intercourse against the wife's actual will is excluded from the law of rape by the fictional deemed consent to intercourse perceived by Hale in his much-cited dictum that "by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract."[1] This notion is not only quite artificial but, certainly in the modern context, is also quite anomalous. Indeed it is difficult to find any authority or commentator who now thinks that it is even remotely supportable.[2] The artificial and anomalous nature of the

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1. 1 PC 629.

2. It is perhaps unnecessary to give an extensive list of the criticisms that this proposition has evoked. A typical comment is that "it would be an understatement

marital immunity can be seen if it is reviewed against the current law on the legal effects of marriage. We deal with that law in the next section.

2. The legal effects of marriage

4.3 The concept of deemed consent is artificial because the legal consequences of marriage are not the result of the parties' mutual agreement. Marriage is in fact a contract quite unlike any other. Although the parties must have the legal capacity to enter into the marriage contract and must observe the necessary formalities, they are not free to decide the terms of the contract. Marriage is rather a status from which flow certain rights and obligations. It has been described as follows -

> "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract ... The reciprocal rights arising from this relation, as long as it continues, are such as the law determines from time to time, and none other."[3]

This point was emphasised by Hawkins J in Clarence[4] when he said: "The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent

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2. Continued
to say that this authentic example of male chauvinism fails to accord with current opinion as to the rights of husbands": Williams, Criminal Law, 2nd ed. (1983), p. 237.

3. Per Appleton CJ, Adams v Palmer (1863) 51 Maine 480, 483.

4. (1888) 22 QBD 23, 54. See para. 2.10 above.

on her part, but is mere submission to an obligation imposed on her by law."

4.4 The rights and duties arising from marriage have, however, changed over the years as the law has adapted to changing social conditions and values. The more modern view of marriage is that it is a partnership of equals.[5] Thus, for example, although at common law a husband had a duty to maintain his wife but she had no reciprocal duty in relation to her husband, there is now a mutual right of support.[6] Again, at common law, a husband became entitled to most of his wife's property on marriage although she had no rights to his property, other than her rights of dower if he predeceased her: whereas a married woman now has full power to dispose of all her property as if she were a feme sole,[7] and there is a mutual right to inherit the other spouse's property if he or she dies intestate.[8] Spouses also have equal rights to make a claim against the estate of a deceased spouse if the will or the intestacy rules fail to make reasonable financial provision for him or her.[9] Furthermore, married women have recently been given independence and privacy in their tax affairs in that their income will no longer be deemed to be that of their husband

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5. See, e.g., the comments of Lord Justice-General Emslie in Stallard v HM Advocate 1989 SCCR 248, 254; 1989 SLT 469, 473, cited in n. 84, para. 6.3 of Appendix B below.

6. Social Security Act 1986, s. 26(3); Matrimonial Causes Act 1973, s. 25; and Domestic Proceedings and Magistrates' Courts Act 1978, s. 1.

7. The Law Reform (Married Women and Tortfeasors) Act 1935, ss. 1(a) and 2.

8. Administration of Estates Act 1925, ss. 46-49, as amended by the Intestates' Estates Act 1952.

9. Inheritance (Provision for Family and Dependants) Act 1975, s. 1.

for income tax purposes.[10] It is also now the view that both parties to a marriage have an equal voice in matters which affect their communal life, such as where they should live and how their children should be brought up. As Lord Denning said over forty years ago (in relation to deciding where the matrimonial home should be) -

> "It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over that of the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern."[11]

4.5 In keeping with these changes, the right to consortium, which means primarily living together as husband and wife and sharing a common home and a common domestic life, was in this century recognised as a mutual right,[12] although earlier cases had suggested that the husband had the right to his wife's consortium but not vice versa.[13] The duty to cohabit and the right to sexual intercourse were incidents of consortium. However, it is nowadays misleading to talk in terms of "rights", since these are not rights in the strict sense of the word, as there is no longer any legal machinery for enforcing them.

4.6 The only remedy available to a deserted spouse who wished the other spouse to resume cohabitation was the decree of restitution of conjugal rights. Originally, there was power to excommunicate a respondent who failed to obey

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10. With effect from 6 April 1990: Finance Act 1988, s. 32

11. Dunn v Dunn [1949] P 98, 103.

12. See Place v Searle [1932] 2 KB 497, 512.

13. See, e.g., Re Cochrane (1840) 8 Dowl 630 (referred to in Jackson [1891] 1 QB 671, at pp. 679, 682-3 and 685).

such a decree but this was abolished in 1813 and replaced by a power to commit for contempt, which was in turn abolished in 1884.[14] There was thereafter no direct sanction for failure to comply with the decree.[15] It was finally abolished in 1970, along with the other remedies against third parties who interfered in the marital relationship.[16]

4.7 Until the end of the nineteenth century, it was thought that a husband could lawfully confine his wife in order to enforce his right to consortium.[17] Similarly, it used to be thought that a husband had the right to administer corporal punishment to his wife, without being liable to prosecution for assault.[18] In Jackson,[19] however,

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14. By the Matrimonial Causes Act of that year.

15. It remained useful, however, for some time to obtain a decree for restitution of conjugal rights where a wife wanted access to the court's ancillary powers, particularly in relation to maintenance; furthermore, from 1884 failure to comply with the decree constituted desertion such that the deserted spouse could immediately petition for judicial separation or a wife could petition for divorce if the husband had also committed adultery (until 1923 when wives as well as husbands were allowed to petition for adultery alone). When the Law Reform (Miscellaneous Provisions) Act 1949 allowed applications for maintenance without the need to bring other proceedings, the decree for restitution of conjugal rights no longer served any useful purpose.

16. Matrimonial Proceedings and Property Act 1970, s. 20; Law Reform (Miscellaneous Provisions) Act 1970, ss. 4 and 5. The husband's claim for damages against a third party who, through breach of a contractual duty or by tort against his wife, had deprived the plaintiff of his wife's services and society was abolished by the Administration of Justice Act 1982, s. 2.

17. See, e.g., Re Cochrane (1840) 8 Dowl 630 (referred to in Jackson [1891] 1 QB 671, at pp. 679, 682-3 and 685).

18. Hale said in 1674 in Lord Leigh's Case, 3 Keb. 433, that a husband could only admonish and confine his

the Court of Appeal held that a husband had no right to enforce his right to consortium extra-judicially by seizing his wife (who refused to comply with a decree for restitution of conjugal rights), bringing her back to his house and preventing her from leaving the premises. Lord Halsbury LC said that he regarded "with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to a wife whom the husband has sworn to cherish and protect."[20] He also stated that "... such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilised country."[21] Moreover, in Reid it was held that a husband is guilty of the common law offence of kidnapping if he steals his wife, carries her away or secretes her against her will and it was said that: "The notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete".[22] Another example of the court's refusal to countenance self-help to enforce the right to consortium, though in this case no force was involved, is Nanda v Nanda,[23] where a

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18. Continued
wife but in 1736 Bacon stated in his Abridgment of the Law (7th ed.), vol. 1, p. 444, that a husband could beat his wife but not in a violent or cruel manner, and confine her. This statement also appeared in the 1832 edition. See also R. and R. Dobash, Violence Against Wives (1980), Chs. 3 and 4.

19. [1891] 1 QB 671.

20. At p. 681.

21. At p. 679.

22. [1973] QB 299, 303.

23. [1968] P 351.

husband was granted an injunction against his wife who, having obtained a decree for restitution of conjugal rights against him, sought to enforce it by installing herself in the flat where he was living with his new family.

4.8 The duty to cohabit cannot, therefore, be enforced against the other spouse, either judicially or by extra-judicial means. Nor is the right to sexual intercourse enforceable through the court. As was said in Paton v BPAS Trustees and Another -

> "The law is that the court cannot and would not seek to enforce or restrain by injunction matrimonial obligations, if they be obligations, such as sexual intercourse or contraception ... . Personal family relationships in marriage cannot be enforced by the order of a court."[24]

4.9 Disagreements about sexual intercourse may, of course, be a major factor contributing to the breakdown of a marriage, in which case the remedies of divorce, nullity or judicial separation may be available. It is, however, impossible to characterise these remedies as being based on, or as recognising a "right" to sexual intercourse. A decree of nullity may be obtained if either party is incapable of consummating the marriage[25] or if the respondent wilfully refuses to do so.[26] However, neither ground can be relied upon if the petitioner led the respondent to believe that he or she would not do so and it would be unjust to the respondent to grant the decree.[27] Nor can wilful refusal be relied upon if the respondent has

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24. [1979] QB 276; per Baker P at p. 280E-F.

25. Matrimonial Causes Act 1973, s. 12(a).

26. Ibid., s. 12(b).

27. Ibid., s. 13(1).

a good reason, such as a pre-marital agreement,[28] for the refusal. And even if the refusal is wilful, the husband is not entitled to use more than "tact, persuasion and encouragement" to overcome it.[29]

4.10 Similarly, refusal of sexual intercourse without justification could amount to cruelty under the pre-1969 divorce law[30] and might nowadays lead to a finding that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.[31] However, infrequent and unsatisfactory intercourse due to the other spouse's low sexual drive has been held to be insufficient to found a "behaviour" petition.[32] A decree of divorce was also refused to a husband who complained that his wife refused to have intercourse with him more than once a week.[33] On the other side of the coin, however, the

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28. e.g. Scott v Scott (orse Fone) [1959] P 103; see also Jodla v Jodla [1960] 1 WLR 236.

29. Baxter v Baxter [1947] 1 All ER 387 (CA): "It is not to be thought that in such cases the husband would be entitled to say that she had been guilty of wilful refusal within the meaning of the sub-section until at least he had unsuccessfully brought to bear such tact, persuasion and encouragement as an ordinary husband would use in the circumstances ... . We do not place among such reasonable steps the use of force or a trick" (per Lord Greene MR, at p. 388; the point did not arise in this form before the House of Lords [1948] AC 274).

30. See Sheldon v Sheldon [1966] P 62, Evans v Evans [1965] 2 All ER 789 and P(D) v P(J) [1965] 1 WLR 963, but cf. P v P [1964] 3 All ER 919 and also B(L) v B(R) [1965] 1 WLR 1413, where the husband's refusal to have sexual intercourse was held not to amount to cruelty, even though the wife's health was affected as a result.

31. Matrimonial Causes Act 1973, s. 1(2)(b).

32. Dowden v Dowden (1978) 8 Fam Law 106.

33. Mason v Mason (1981) 11 Fam Law 143.

respondent's insistence upon sexual intercourse may well make it unreasonable to expect the petitioner to live with him. Excessive[34] or perverted[35] sexual demands, insistence on the practice of coitus interruptus[36] and infecting the other spouse with venereal disease[37] have all been held to amount to cruelty under the old law. Although there is no reported case on the matter, it is probable that a court would nowadays hold that a wife whose husband had obliged her to have sexual intercourse with him against her will could not reasonably be expected to live with him. In any event, behaviour of this sort is only one of the ways in which it may be shown that the marriage has irretrievably broken down.[38] Divorce is no longer seen either as a means of enforcing matrimonial "rights" or as a punishment for breaking matrimonial obligations.

4.11 This gradual recognition of mutual rights and obligations within marriage, described in paragraphs 4.3-4.10 above, in our view demonstrates clearly that, whatever other arguments there may be in favour of the immunity, it cannot be claimed to be in any way justified by the nature of, or by the law governing, modern marriage.

3. Our provisional conclusion

4.12 The general rule, that a husband cannot be convicted for raping his wife, has to some extent been ameliorated by cases that provide that where a formal separation agreement,

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34. Holborn v Holborn [1947] 1 All ER 32.

35. Ibid.

36. Cackett v Cackett [1950] P 253.

37. Foster v Foster [1921] P 438.

38. Which, under the Matrimonial Causes Act 1973, s.1(1), is the sole ground for divorce.

or various types of court order, or (possibly) an actual separation have intervened in the marriage the husband may be guilty of rape if he engages in non-consensual intercourse.[39] But those cases have merely underlined that the immunity is based on a general obligation assumed to be undertaken by the wife at the time of the marriage, which obligation is by the same token assumed only to be able to be lifted by operation of law or by her withdrawal from the household.[40] The cases have thus proceeded on the basis that the general rule of immunity is still valid, their main concern having been to set out the limits of the exceptions to that rule.

4.13 Our present concern is not with those exceptions, even though the attempts to limit the marital immunity have produced an uncertain, confusing and anomalous group of authorities.[41] Rather, this working paper is directed at the immunity itself. However, the mere fact that the reason given in the cases for the existence of the immunity is unsustainable does not, in this instance, in any way conclude the question of the future of the immunity. Previous discussions of the question have appealed to a wide range of issues of legal and social policy, and to pragmatic considerations. None of these is apparent from the cases, but they are recognised as relevant to the policy decision on whether the immunity should remain. We review those matters in the remainder of this Part of the paper.

4.14 As we indicated in paragraph 1.6 above, at the start of this paper, we have as a result of that review reached

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39. See paras. 2.11-2.26 above.

40. See in particular the observations of Byrne J in Clarke (1949) 33 Cr App R 216, cited in para. 2.19 above.

41. See para. 2.11 above.

the provisional conclusion that the marital immunity in rape should be abolished in its entirety. That conclusion is, as we say, only provisional, and is subject to the comments and criticisms that we hope this working paper will evoke. We state it at this stage because, to the extent that the arguments reviewed in the paper are analysed from that point of view, we hope that this clear indication of our method will assist readers in taking a critical attitude to what we say. As already indicated, we are anxious that those who take a different view on any of these issues, or on the question of the marital immunity generally, should put those views before us, and in particular should point out any empirical evidence or practical difficulties that we have overlooked or to which we have not given sufficient weight.

4.15 In the following sections we therefore review the various considerations of which we are aware that touch on the issue of whether non-consensual intercourse between husband and wife should be subject to the law of rape.

B. THE SIGNIFICANCE OF NON-CONSENSUAL INTERCOURSE WITHIN MARRIAGE

4.16 We think that the principal matter to be considered in deciding whether the present marital immunity is supportable on grounds of policy and principle, as opposed to history, is whether non-consensual intercourse by a husband with his wife is sufficiently different from non-consensual intercourse by a man with a woman to whom he is not married, or with his wife when a non-molestation or personal protection order is in existence, as to justify giving the husband immunity from the law of rape. That in its turn involves consideration of the nature of, and justification for the existence of, the crime of rape.

4.17 The reasons for the existence of a separate crime of rape, and for that crime being regarded as of a particularly

serious nature, are in our view best expressed by the CLRC's Policy Advisory Committee, in a passage specifically approved by the CLRC itself -

> "Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. That is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and the victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value."[42]

4.18 The (narrow[43]) majority of the CLRC did not, however, agree that those considerations operate where the non-consensual intercourse is by a husband with his wife -

> "The majority of us, who would not extend the offence of rape to married couples cohabiting at the time of the act of sexual intercourse, believe that rape cannot be considered in the abstract as merely 'sexual intercourse without consent'. The circumstances of rape may be peculiarly grave. This feature is not present in the case of a husband and wife cohabiting with each other when an act of sexual intercourse occurs without the wife's consent. They may well have had sexual intercourse regularly before the act in question and, because a sexual relationship may involve a degree of compromise, she may sometimes have agreed only with some reluctance to such intercourse. Should he go further and force her to have sexual intercourse without her consent, this may evidence a

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42. Fifteenth Report, at para. 2.2. This passage was cited with approval by the Court of Appeal in Billam (1986) 8 Cr App R (S) 48, 49-50.

43. Fifteenth Report, para. 2.70.

failure of the marital relationship. But it is far from being the 'unique' and 'grave' offence described earlier (paragraph 2.3[44]). Where the husband goes so far as to cause injury, there are available a number of offences against the person with which he may be charged, but the gravamen of the husband's conduct is the injury he has caused not the sexual intercourse he has forced."[45]

4.19 Like the minority of the CLRC, we find that view hard to accept. The minority were, in our view, right to say that "a woman, like a man, is entitled on any particular occasion to decide whether or not to have sexual intercourse, outside or inside marriage."[46] The question is, therefore, whether, as the minority thought, she is entitled to be protected in both situations, inside and outside marriage, by the law of rape. We have quoted in paragraph 4.18 above the grounds advanced by the majority of the CLRC for distinguishing the two cases. We see the following difficulties in the distinction that they made.

4.20 First, and most fundamentally, if the rights of the married and the non-married woman are in this respect the same, those rights should be protected in the same way,

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44. (Footnote added.) The CLRC stated in that paragraph -

> "The section on rape in our Working Paper attracted more comment than any other, much of it in strong terms, expressing views sincerely held. We approach this part of our Report on the basis that rape should continue to be regarded as a unique and grave offence, and in the knowledge that anything which appears to diminish its gravity will be viewed with suspicion by Parliament and the public."

45. Fifteenth Report, para. 2.64.

46. Fifteenth Report, para. 2.72. We suggest that this conclusion is supported by the consideration of the modern law of marriage set out in paras. 4.3-4.11 above.

unless there are cogent reasons of policy for taking a different course.

4.21 Second, it is by no means necessarily the case that non-consensual intercourse between spouses has less serious consequences for the woman, or is physically less damaging or disturbing for her, than in the case of non-consensual intercourse with a stranger.[47] Depending on the circumstances the wife whose husband thrusts intercourse upon her may suffer pain from the act of intercourse itself; or the fear or the actuality of venereal or other disease; or the fear or the actuality of an unwanted pregnancy if because of the suddenness of the attack she has taken no contraceptive precautions or such precautions are unacceptable or impossible for medical reasons; and in the event of actual pregnancy a termination may be unavailable or morally offensive to her. All of these hazards may apply equally in the case of marital as of non-marital rape.

4.22 Third, we think that there is a danger that the CLRC underestimated the emotional and psychological harm that a wife may suffer by being subjected by her husband to intercourse against her will, even though on previous occasions she has willingly participated in the same act with the same partner. In Kowalski[48] the Court of Appeal approved the trial judge's ruling, in respect of an act of fellatio that the husband compelled the wife to perform on him, that she was entitled to say -

> "I agree I have done that with you before. I agree I did not find it indecent when we did it as an act of love, but I now find it indecent; I find it repell[e]nt; I find it abhorrent."

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47. As to the consequences for the victim of any rape, see, e.g., the comments of the CLRC's Policy Advisory Committee, cited at para. 4.17 above.

48. (1987) 86 Cr App R 339; discussed more fully at para. 2.34 above.

It is well recognised that unwanted sexual intercourse can be a particularly repellent and abhorrent experience for a woman: that is one main justification for the existence of the offence of rape. We see no reason why a wife cannot say that she feels that abhorrence for such intercourse with her husband, whether or not she has willingly participated on previous occasions.[49]

4.23 Fourth, for a man to oblige his wife to have intercourse without her consent may be equally, or even more, "grave" or serious as when that conduct takes place between non-spouses. We quoted in paragraph 4.17 above the CLRC's own view, when discussing the seriousness of rape as an offence, that it was important that "the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value."[50] In the case of the husband, however, he abuses not merely an act to which, as a matter of abstract principle, society attaches value, but the act that has been or should have been his means of expressing his love for his wife. There seems every reason to think that that abuse can be quite as serious on the part of the husband, and quite as traumatic for the wife, as is rape by a stranger or casual acquaintance.

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49. As part of a report, Rape Study, A Discussion of the Law and Practice (1983), by Warren Young, commissioned by the New Zealand Minister for Justice, seven victims of marital rape were interviewed. For these women "rape was a symptom of a violent and unhappy relationship which extended over a long period of time. Although these victims were accustomed to violence, therefore, they nonetheless reported experiencing real and severe physical and mental anguish, including feelings of terror, helplessness, shame and degradation." (p. 121) The report is more fully considered in paras. 5.1-5.2 of Appendix B below.

50. Fifteenth Report, para. 2.2, cited in para. 4.17 above.

4.24 Fifth, in many cases where the husband forces intercourse on his wife they will be living in the same household, or at least she will be in some sort of dependent relationship with him. It is likely to be harder, rather than easier, for such a woman to avoid her husband's insistence on intercourse, since to do so she may for instance have to leave the matrimonial home. That is a further respect in which non-consensual intercourse by a husband may be a particular abuse.

4.25 Our view, as at present advised, is therefore, that there are no good grounds of principle for distinguishing between marital and other types of rape. We shall of course particularly welcome responses from consultants who hold a different opinion. That being our provisional view as to the issue of policy, it is convenient to devote the remainder of this Part IV to the various arguments of policy that have been used to justify the present marital rape immunity. In that review we have particularly in mind that the effect of applying the modern law of rape to non-consensual intercourse within marriage will be that, as in other cases of rape, such intercourse will be criminal simply by reason of lack of consent, without the necessity for any additional force or violence.[51] We invite comment on all the issues reviewed below.

C. DETRIMENT TO THE PARTIES' MARRIAGE AND THE INSTITUTION OF MARRIAGE

4.26 One of the arguments against removal of the immunity from prosecution is that to allow a wife to bring a charge of rape against her husband would inhibit any chances of reconciliation and might be detrimental to the institution of marriage. In effect this is two rather different

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51. See para. 2.2 above.

arguments: first, that the wife may change her mind but be unable to halt the process which may destroy the marriage; and secondly, that she should not be permitted to put her own interests before those of her family by invoking the protection of the criminal law, if to do so may put her marriage at risk.

4.27 As to the first of these arguments, the tendency of wives to withdraw allegations of domestic violence is frequently cited as a problem by the police and legal practitioners.[52] The extent to which they do so in fact is disputed[53] and it has been observed that "The degree of police concern over possible withdrawal of the complaint is not matched ... by the frequency with which this occurs in practice."[54] There is also evidence that the attitude of police officers themselves can contribute to the wife's decision not to proceed.[55] Nevertheless, it would be surprising if many women were not reluctant to prosecute, once the immediate crisis was over. There may be a genuine reconciliation between the parties; or the wife, no matter

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52. M. Dow in "Police Involvement" in M. Borland (ed.), Violence in the Family (1976), at pp. 132-3, states that she will "invariably" refuse to give evidence; see also Memorandum submitted by the Metropolitan Police to the Select Committee on Violence in Marriage, H.C. 553 II 1974-1975, pp. 376-377 and M. Borkowski, M. Murch and V. Walker, Marital Violence (1983), pp.115-125.

53. e.g. by Dobash and Dobash, op. cit., and F. Wasoff, "Legal Processing of Domestic Assaults by Scottish Prosecutors and Criminal Courts", (1982) 10 Int J Soc of Law 187.

54. T. Faragher, "The police response to violence against women in the home", in J.Pahl (ed.), Private Violence and Public Policy (1985), p. 117, citing B. Dawson and T. Faragher, Battered Women's Project: Interim Report (1977).

55. A. Bourlet, Police Intervention in Marital Violence (1990), p. 48.

how cruelly she has been treated by her husband, may be reluctant to see him imprisoned or fined; or she may fear reprisals or the break up of the family and the financial hardship that may result. Other reasons for choosing to stay with a violent husband include concern for the children, who would otherwise be deprived of a father, fear of social embarrassment, or in some cases that the threat of proceedings has produced a change in the husband's behaviour.

4.28 In domestic violence cases, the attitude of the victim will usually be an important factor in deciding whether or not to proceed with a prosecution. It is said, however, that if a wife were able to charge her husband with the criminal offence of rape she might not easily be able to withdraw her allegations. The CLRC expressed their concern in the following way -

> "Once ... a wife placed the facts of an alleged rape by her husband before the police she might not be able to stop the investigative process if she wanted to. The police would be under a duty to investigate the matter thoroughly - as with any allegation of a serious offence."[56]

4.29 Police investigations are, of course, directed towards the case for a possible prosecution. They must therefore be conditioned by whether or not the public interest requires a prosecution in the particular case. The Code for Crown Prosecutors states that the complainant's attitude may be taken into account in deciding whether or not to prosecute -

> "In some cases it will be appropriate for the Crown Prosecutor to have regard to the attitude of a complainant who notified the police but later expresses a wish that no action be taken. It may be that in such circumstances proceedings need not be pursued unless either there is suspicion that the

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56. Fifteenth Report, para. 2.66.

change of heart was actuated by fear or the offence was of some gravity."[57]

This judgement obviously has to be made with particular sensitivity in all cases where the reluctance of a wife to proceed against her husband has to be balanced against the gravity of the alleged offence. We would particularly welcome comment on these issues. Rape is a serious offence and indeed this has been stressed recently by the Court of Appeal.[58] It may be, therefore, that the police and Crown Prosecution Service would feel under a duty to proceed with a prosecution in spite of the wife's withdrawal, provided of course that it was felt that there was sufficient evidence to justify proceedings. As to sufficiency of evidence, in any domestic violence case, whether or not involving rape, the police have had difficulty in proceeding with a prosecution where the wife has withdrawn her allegations. The evidence of the police to the Select Committee on Violence in Marriage was that -

> "Experience has shown that prosecutions have failed or could not be pursued because of a withdrawal by the wife of her complaint or because of her nervous reaction to the prospect of giving evidence against her husband."[59]

That was written before a wife became compellable to give evidence for the prosecution against her husband in cases of assault or injury[60] and, for the reasons which we explain in

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57. Para. 8(vii).

58. Billam (1986) 8 Cr App R (S) 48. (See para. 4.43 ff. below.)

59. Report from the Select Committee on Violence in Marriage, H.C. 553 II (1974-1975): Memorandum submitted by the Metropolitan Police, p. 376, para. 13.

60. Police and Criminal Evidence Act 1984, s. 80(3). Before the enactment of this provision, it was at one time generally believed that a wife was a compellable

paragraph 4.70 below, we consider that it should be made plain beyond doubt that those provisions apply equally in the case of rape. Nevertheless, even if she is compellable, there will be obvious practical difficulties in bringing a successful prosecution if the wife, who will be an essential, and in many cases the sole, witness is reluctant to give evidence.

4.30 The practical reality is, however, that in any case where a complainant does not wish to proceed, but the alleged offence is a serious one, a delicate balancing exercise is involved in deciding whether to go ahead. Where the complainant and accused are husband and wife and the effect of a conviction would be to break up the family, the decision becomes even more difficult. If the immunity were to be removed, that could underline the need to give careful consideration to the policy to be adopted by the Crown Prosecution Service in all marital cases, which may in any event merit further refinement. We do not, however, regard marital rape cases as raising difficulties which are in principle any different from those which arise in serious cases of violence between husband and wife. Nor do they provide any justification for denying the protection of the law to those wives who do wish the prosecution to proceed.

4.31 As regards the second argument referred to in paragraph 4.26 above, the CLRC feared that

> "The effect of the intervention of the police might well be to drive couples further apart in cases where a reconciliation might have occurred. All of this, more likely than not, would be detrimental to the interests of any children of the family."[61]

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60. Continued
prosecution witness in a case of violence on her by her husband; but this view was overturned in Hoskyn v Metropolitan Police Commisioner [1979] AC 474.

61. CLRC, Fifteenth Report, para. 2.66.

And in its Working Paper on Sexual Offences[62] -

> "The type of questions which investigating police officers would have to ask would be likely to be greatly resented by husbands and their families. The family ties would be severed and the wife with children would have to cope with her emotional, social and financial problems as best she could; and possibly the children might resent what she had done to their father. Nearly all breakdowns of marriage cause problems. A breakdown brought about by a wife who had sought the protection of the criminal law of rape would be particularly painful."

And, according to another commentator -[63]

> "When two people are able, on their own, to compromise difference and resolve problems, a greater mutual respect and bond might be expected to result than if the couple had resort to the legal system of resolution. Allowing access to the criminal justice system for every type of marital dispute will discourage resolution by the spouses and will make ultimate reconciliation more difficult."

4.32 It is, however, important in connection with these arguments to remember that wives who are raped by their husbands are (if the husband's conduct also amounts to an assault or other criminal offence[64]) already able to invoke the criminal law, with all that that entails, including intrusive questioning by the police about intimate aspects of the parties' relationship. It could equally be argued that in those cases police intervention and prosecution are unlikely to improve the relationship between the spouses. For that matter, even the granting of a civil ouster injunction in a case of domestic violence has the automatic effect of breaking up the family unit, at least while the

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62. (1980), para. 33.

63. Hilf, "Marital Privacy and Spousal Rape", (1980) 16 New Eng L Rev 31.

64. See paras. 2.33-2.40 above for a discussion of the present state of the law on this issue.

order is in force, yet it is not suggested that these remedies should not be available to a wife against her husband. Nor should it be assumed that criminal proceedings are necessarily fatal to a marriage. Judging by the evidence in domestic violence cases, even where criminal, rather than civil, proceedings are brought against the husband, the parties may later be reconciled.[65] The same may even happen after a charge of rape.[66]

4.33 The argument that the children might resent what their mother had done to their father could also be applied to cases of assault, especially where the husband is imprisoned or ordered to leave the matrimonial home. Moreover, one might also ask whether in a case of marital rape, or domestic violence, the children might resent what their father had done to their mother. The evidence of Mrs X to the Select Committee on Violence in Marriage, for example, was that it was her children who finally asked whether they, and their mother, could leave the matrimonial home after years of violence from their father towards their mother.[67]

4.34 More fundamentally, however, there is the question of whether reconciliation should automatically be regarded as the primary goal. We question whether it is valid to argue that it may not be desirable to allow a husband to be prosecuted for rape of his wife because that would inhibit

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65. See the Memorandum submitted by the Metropolitan Police to the Select Committee on Violence in Marriage (n. 59, para. 4.29, above), p. 376, para. 13, and p. 377, para. 21.

66. This is illustrated by the United States case of State v Rideout (Or. Cir. Ct., December 27 1978) 5 Fam L Rep 2164 (1978) in which the parties were reconciled within weeks of the husband's acquittal.

67. Report from the Select Committee on Violence in Marriage, H.C. 553-II (1974-1975), p. 16, para. 56.

reconciliation. There are certainly powerful arguments against that view. Mitra has said that "to exonerate the husband from punishment qua husband is to advocate a social morality which subordinates a wife's integrity to the greater good of the family."[68] Freeman has also argued that reconciliation may not always be desirable -

> "It is all very well to want the family to function properly, but when it has not done so, it may very well not be in the victim's best interests to use social work intervention to restore the status quo ante."[69]

In disputes over custody or the matrimonial home the current view is that it is better in most cases for the parties to settle their differences on their own or with the help of a mediator, rather than resorting to legal proceedings in the hope that, even if reconciliation is not possible, matters can be settled amicably. But where rape is the issue, as with situations of domestic violence, the priority has to be prevention. As the Irish Law Reform Committee has said: "It can hardly be a sound policy to remove from a wife the protection of the law for fear that in some instances recourse to this protection may have unfortunate effects."[70]

D. THE SUFFICIENCY OF MATRIMONIAL REMEDIES

4.35 The CLRC said that "Where the parties are cohabiting ... most of us regard matrimonial law as the main protection for married women against the unreasonable demands of their

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68. C. L. Mitra, "For She Has no Right or Power to Refuse Her Consent", [1979] Crim LR 558, 565, n. 46.

69. M. D. A. Freeman, "'But If You Can't Rape Your Wife, Who Can You Rape?': The Marital Rape Exemption Re-examined", (1981) XV Fam L Q 1, 17.

70. Consultation Paper on Rape, (1987) para. 68.

husbands" and "The majority of us would not wish to see this jurisdiction complicated or eroded by the criminal law."[71]

4.36 The matrimonial remedies available to a wife who has been, or fears she will be, raped by her husband include a non-molestation or ouster injunction in the High Court or a county court; or a personal protection or exclusion order in a magistrates' court.[72] Breach of any of these orders may make the husband liable to a fine or imprisonment. However, in the case of the magistrates' court remedies, it is necessary to show that the husband has used or threatened to use "violence"[73] and, in the case of an exclusion order, that the wife (or a child of the family) is in danger of being physically injured by the husband.[74] Furthermore, a power of arrest can only be attached to a personal protection or exclusion order if the court is satisfied that the husband has physically injured the applicant (or a child of the family) and is likely to do so again.[75] Similarly, although violence need not be shown in order to obtain a non-molestation or ouster injunction in the High Court or a county court, a power of arrest can only be attached to such an order (and in the case of a non-molestation order, it must contain a provision specifically restraining the husband from using violence) if the court is satisfied that the husband has caused actual bodily harm to the wife (or a child living with her) and is likely to do so again. Thus,

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71. Fifteenth Report, para. 2.79.

72. See paras. 2.12-2.18 above.

73. Which requirement may not be satisfied by the mere act of non-consensual intercourse without "collateral" violence.

74. Domestic Proceedings and Magistrates' Courts Act 1978, s. 16(2) and (3).

75. Domestic Proceedings and Magistrates' Courts Act 1978, s. 18(1).

even if the wife has already been raped by her husband, violence is a prerequisite of the grant of an order in a magistrates' court, and to the attachment of a power of arrest in any court. Without the power of arrest the police will not be able to enforce what is a purely civil remedy; and then the only way to enforce the order is for the wife to bring proceedings for contempt or, in a magistrates' court, noncompliance with the order. Neither method is particularly speedy or effective.[76]

4.37 As a longer-term remedy the wife may petition for divorce or judicial separation on the basis that the husband has behaved in such a way that she cannot reasonably be expected to live with him. These remedies would, however, be inadequate as the sole means of protection of the wife against non-consensual intercourse because, since they involve the alteration of the parties' legal status and have substantial ancillary consequences, they take time to obtain. For instance, currently the parties must have been married for a year before a petition for divorce can be filed;[77] and it will take several months on average for a decree to be obtained. More important, as we point out in paragraphs 4.39-4.42 below, they entail much wider, and not necessarily welcome, consequences than the elimination of unwanted intercourse.

4.38 This account of the matrimonial remedies indicates, in our view, their inadequacy as a means of preventing or deterring non-consensual intercourse. The matrimonial

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76. See S. Maidment, "The Law's Response to Marital Violence in England and the USA", (1977) 26 ICLQ 403, at p. 422; also our Working Paper No. 113 (1989), Domestic Violence and Occupation of the Family Home, paras. 5.6-5.9.

77. Matrimonial Causes Act 1973, s. 3, as amended by the Matrimonial and Family Proceedings Act 1984, s. 1.

remedies outlined in paragraph 4.36 above are not always easy to enforce, particularly because, in the absence of a power of arrest, the police have great difficulty in intervening effectively. The remedies of divorce or judicial separation are clearly of no deterrent effect, since the possibility that at some date in the future a sanction may descend, in the shape of the termination of the marriage, is hardly likely to affect the behaviour of a husband intent on immediate intercourse. In this context, indeed, these remedies are not the wife's but the husband's: if he objects to her attitude to intercourse, it is to matrimonial remedies, rather than to force, that he should have recourse.

4.39 However, quite apart from questions of the practical efficacy of matrimonial remedies, there is a more fundamental objection that, by providing those remedies alone, the law simply does not respond appropriately to non-consensual intercourse in marriage. There are a number of strands to this argument.

4.40 First, if non-consensual intercourse within marriage became a crime, that would not exclude the use of matrimonial remedies in addition to criminal sanctions. The decision whether additionally to have resort to such remedies would remain that of the wife. However, the literature on domestic violence shows that many women are capable of forgiving their husbands even after serious violence, which merited and received a substantial prison sentence, or at least are prepared to have their husbands back in order to keep the family unit together in their children's interests. The consequences of separation and divorce are serious, not only for children but also for wives, who are frequently dependent both financially and in other ways upon their husbands. That dependence should not place her at greater risk of rape than other women. We doubt whether it can be right that, where the husband's

behaviour takes the form of rape, such a wife should be forced either to mark her and society's disapproval of such behaviour by seeking a matrimonial remedy that she does not want and which may have very unwelcome consequences for her and her children; or to ignore that behaviour altogether.

4.41 Second, the suggestion that matrimonial proceedings are adequate by themselves ignores the different respective functions of criminal and of family law. As we point out further in paragraph 4.65 below, an important purpose of the criminal law is to show society's disapproval of certain types of behaviour. It aims to deter individuals from behaving in a particular way and so protect society and its citizens from that behaviour. Family law, on the other hand, aims to resolve differences between the parties and to sort out living arrangements, in terms of finances, accommodation, child care and so on, when family relationships break down. Protection of the weaker family members is obviously very important, and sanctions exist for breach of obligations owed to them, but family law does not aim to set standards of socially acceptable behaviour by holding out the threat of punishment for those who do not conform to those standards. For that reason, as Maidment has pointed out,[78] the matrimonial injunction is really a hybrid remedy, drawing on the criminal as well as the civil law. Its inadequacy as a purely civil remedy for the protection of victims of domestic violence has led to a borrowing from the criminal system, that is, the ability to attach a power of arrest to give it some "teeth".

4.42 Third, non-consensual intercourse is an act of a particular and serious kind, the nature of which is marked by the specific crime of rape. As we have already

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78. S. Maidment, "The Relevance of the Criminal Law to Domestic Violence", [1980] JSWL 26, at p. 28.

indicated,[79] we are not persuaded that the effects of such intercourse, when it takes place within marriage, are sufficiently different from those of rape outside marriage to justify the immunity. On that view, to claim that non-consensual intercourse within marriage can be adequately regulated by matrimonial remedies, which are based on different considerations and directed at different ends from those of the criminal law, undervalues the seriousness of marital rape, and fails to acknowledge the reasons why such conduct should attract a criminal sanction.

E. SENTENCING ISSUES

4.43 The Court of Appeal has recently stressed the importance of sentences in rape cases reflecting the seriousness with which rape is viewed by society, and has suggested that "for rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case."[80] It may be thought that that approach will cause difficulty or inconsistency if the law of rape is extended to cases within marriage; however, analysis of the various factors involved suggests that such fears are unfounded.

4.44 In any case of marital rape the court would have to assess the seriousness of what had occurred, bearing in mind that the accused would have been convicted of having intercourse with a woman without her consent, an act that the law regards as at least potentially of considerable gravity. In cases involving (non-married) cohabitants the Court of Appeal has stressed that the mere fact that parties have been living together over a substantial period and

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79. Paras. 4.16-4.25 above.

80. Billam (1986) 8 Cr App R (S) 48 at p. 50.

having regular sexual intercourse does not license the man to attempt to continue that intercourse when the woman's consent has ceased,[81] but "in some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree where the offender and the victim had previously had a long-standing sexual relationship".[82] In other words, all the circumstances of the case must be taken into account. That process should be no different in a case of marital rape.

4.45 An example of a consistent approach to sentencing in a jurisdiction where marital rape has become a crime is to be found in the observations of the Court of Appeal of New Zealand in relation to sentencing under section 2 of the Crimes Amendment Act (No. 3) 1985, which abolished the marital immunity.[83] The court rejected the suggestion that there should be a "separate regime of sentencing" for rape in cases where the parties were married, and said -

> "Parliament has made no distinction in the penalties between spousal and other kinds of rape, and the sense of outrage and violation experienced by a woman in that position can be equally as severe.
>
> "... An offender's perception of his culpability may be genuinely influenced by cultural or ethnic attitudes to marital rights and obligations, or there may have been a continuing history of some degree of non-consensual intercourse previously tolerated by his wife or partner. Such considerations must vary greatly with circumstances and personality and cannot be elevated to factors of general application."[84]

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81. Attorney General's Reference (No. 7 of 1989) [1990] Crim LR 436, 437.

82. Berry (1988) 10 Cr App R (S) 13, 15.

83. A full account of the law in New Zealand will be found at paras. 5.1-5.5 of Appendix B hereto.

84. R v N [1987] 2 NZLR 268, 270, line 50.

4.46 These observations seem to us to be broadly in line with the English courts' approach to (non-marital) rape, and to indicate that sentencing in marital cases, although far from an easy task, would not be likely to present problems of an order that would cast doubt on the wisdom of extending the law of rape to cases within marriage.

F. DEVALUATION OF THE DETERRENT EFFECT OF THE CRIME OF RAPE

4.47 This concern was expressed by the majority of the CLRC -

> "For rape between cohabiting spouses ... immediate imprisonment might not be appropriate; where no physical injury was caused to the wife, imprisonment would be most unlikely. A category of rape that was dealt with leniently might lead to all rape cases being regarded less seriously ... ."[85]

4.48 Consideration of current practice in cases involving cohabitants or acquaintances suggests fairly strongly that the premise of this argument is not correct.[86] As the Court of Appeal said in imposing a sentence of four years'

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85. Fifteenth Report, para. 2.65.

86. See for instance Cox (1985) 7 Cr App R (S) 422, where in a case involving "some quite exceptional and unusual circumstances" of mitigation, a sentence of four years' imprisonment was considered appropriate for a divorced husband who, having resumed consensual cohabitation and intercourse with his wife, on one occasion secured intercourse against her will by threats. It should be noted, moreover, that that sentence was imposed before the "guideline" judgment of Billam (1986) 8 Cr App R (S) 48, which emphasised the seriousness with which rape should be viewed. In Mills (1988) 10 Cr App R (S) 369 a sentence of four years' imprisonment, on a plea of guilty, was considered correct where a former cohabiting sexual partner of the complainant committed one act of fellatio and one act of rape, without other significant violence.

imprisonment when a girl was raped by her former cohabitant after she had undressed before him when he visited her at the house where they had previously lived together, "Girls in the position of the complainant are entitled to be protected."[87] There is no reason to think that courts would do otherwise than treat cases on their merits, rather than automatically place marital rape in a separate and lesser category of offence. However, even if removal of the marital immunity were to lead to some cases of rape receiving lesser sentences than the current norm, it would not follow that the offence of rape would lose its present valuable deterrent effect. The message conveyed by the law and by the courts about certain forms of undesirable conduct should, in our view, depend on a rational explanation of the particular features that make that conduct objectionable, rather than on a necessary uniformity of treatment of all cases falling within a particular legal description.

4.49 We therefore respectfully suggest that the fears of the majority of the CLRC are unfounded. But, in any event, this possible danger would not in our view be a good reason for refusing to remove the marital immunity if there were other pressing reasons of principle and policy for taking that step.

G. DIFFICULTY OF PROOF OF EVENTS IN THE MATRIMONIAL HOME

4.50 The matters dealt with in this section may be of particular concern, and we therefore invite comment on them from those engaged in the criminal law, because the creation of a crime that presented special difficulties of proof would not only cause serious difficulties in the administration of the law, but might also reflect adversely

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87. Mills (1988) 10 Cr App R (S) 369, 371: see the previous footnote.

on the law as a whole and upon the legal system. Two, perhaps somewhat contradictory, concerns have been expressed in this connection. First, that proof to the standard required by the criminal law would be so difficult that it would be virtually impossible ever to convict in a case where the man could put forward any sort of defence: with the result that the law would be made to look futile, and unfair to the wives that it purported to protect. Second, that there might be a danger of husbands being unfairly convicted of a serious crime, for instance where the position as to the wife's consent was genuinely unclear.

4.51 The majority of the CLRC did not analyse this issue in terms, though they did refer[88] to the particular objections to investigation of the history of a marriage: a matter that we discuss in the following section H of this Part IV. However, in commenting generally on the majority's fears, the minority of the CLRC pointed out that like difficulties already existed in relation to other offences that could arise between husband and wife, and that there was "no evidence that they have proved unduly troublesome in practice or that they would arise in a significantly more awkward form in relation to rape."[89] We are likewise unaware of any evidence to suggest that there would be significantly more problems of proof in relation to rape than in relation to other crimes within marriage, though we shall welcome further comment on that issue. However, because of the importance of this general issue we set out in this section for comment some further factors that seem to us to assist in assessing the matter.

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88. Fifteenth Report, para. 2.69.

89. Fifteenth Report, para. 2.74.

4.52 We may first observe that the concerns mentioned in paragraph 4.50 above cannot both be correct. As to the first, difficulty of proof, issues of evidence and proof in marital rape cases do not in fact appear to be different in kind from those arising in many crimes, sexual and non-sexual, where the case turns on the word of the accused against that of the alleged victim. The courts are well aware of these difficulties, particularly as they affect crimes like rape,[90] and of their obligation to ensure that injustice does not occur. Quite apart from protective rules such as that illustrated by Funderburk,[91] in all such cases one can expect that the trial judge would point out to the jury, even if the point had not been fully made by the defence, that the matter turned on a conflict of testimonies, and, if necessary, would draw attention to any particular reason why the wife's testimony should not be relied on.[92] Indeed, the judge might be particularly acute

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90. See the observations in Cross on Evidence, 6th ed. (1985), at p. 295, in particular that "sexual intercourse, whether or not consensual, most often takes place in private, and leaves few visible traces of having occurred. Evidence is often effectively limited to that of the parties, and much is likely to depend on the balance of credibility between them. This has important effects for the law of evidence since it is capable of reducing the difference between questions going to credit and questions going to the issue to vanishing point." This passage was cited with approval by the Court of Appeal in Funderburk [1990] 1 WLR 587, 597H, a case which concerned a charge of sexual intercourse with a child, as support for the Court's conclusion that evidence ought to have been admitted at the trial of a previous inconsistent statement made by the complainant.

91. See previous footnote.

92. At present, the defendant in a rape case is further protected by the corroboration rules, which require a warning to be given in set terms in relation to the evidence of any complainant in a sexual case. The detailed rules are set out in Part II of the Commission's Working Paper No. 115, Corroboration of Evidence in Criminal Trials. In that Working Paper

to do his duty in that respect when he was dealing with an extension of the criminal law to a new area of sexual relations. We suggest, therefore, that the courts would be able to protect the interests of the accused here as in other cases involving sexual allegations.

4.53 The converse fear is that courts would be so concerned to protect the interests of the accused that the extension of the law of rape to cohabiting married couples would have no practical effect. This would not be a problem in cases where the husband used violence; or boasted of his exploits; or otherwise created secondary evidence. But even in cases where the only evidence was that of the wife, courts would be capable of identifying testimony that was in fact credible and acting on it. We point out below[93] that despite the considerable trauma that can attend participation in a rape trial, at least some complainants, even in cases of rape committed by intimates in private, appear to be willing to come forward, and convictions are obtained. While we recognise that a complaint by a wife

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92. Continued
the Commission expressed as its provisional conclusion, on which it sought comment, that the formal and mandatory corroboration rules should be abolished. However, even if the Commission eventually made a recommendation in these terms, and that recommendation was implemented, that would not mean that effective protection would be removed from the accused in sexual cases. As we pointed out in para. 4.40 of Working Paper No. 115, the corroboration rules, although very unsatisfactory in their present form, originated in a desire to serve the interests of justice in particular cases. Part V of Working Paper No. 115 is devoted to seeking opinion on how those interests can best be furthered if the formal corroboration rules are abolished. In our view, the existence of a law of marital rape would be simply one more case, amongst the many contested cases of sexual offences, to which any new law had to be applied.

93. Paras. 4.66-4.68.

might be scrutinised with particular care both by the prosecuting authorities and by the courts, we have seen no evidence to suggest that a law of marital rape would be unenforceable. As the High Court of Justiciary of Scotland put it in Stallard v H M Advocate,[94]

> "We accept, of course, that proof of rape in marriage will, in many situations, be difficult, but that is no reason for saying that a charge of rape (of his wife) against a husband while the parties are still cohabiting, is not relevant for trial."

4.54 A particular aspect of this question concerns the need on the part of the prosecution to prove that the wife did not consent to intercourse (or that the accused did not believe that she consented[95]). The concept of "consent" in any case of rape gives rise to some problems, which we describe in paragraphs 2.4-2.5 above; but there are several reasons why those problems should not militate against the removal of the immunity.

4.55 In the first place, we are not aware of any reason for thinking that such problems would be more acute in a marital case than in any other rape case. In practice, indeed, it might often be more difficult for the accused plausibly to contend that he had failed to appreciate indications on the part of his wife that she did not consent to intercourse than in cases where there had been no, or a less intimate,

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94. 1989 SCCR 248, 255C-D.

95. See para. 2.7 above. The issue of belief in consent may not in fact be dispositive in many cases. The Heilbron Group suggested that it is extremely difficult in practice for the accused to contend that he believed that the woman consented without contending that she did in fact consent; and that if the jury concludes that she did not consent, his claim that he nevertheless believed in consent is likely to be rejected: Report of the Advisory Group on the Law of Rape (1975), Cmnd. 6352, para. 69.

previous relationship between the parties. Secondly, whether or not this proved to be true, each case would be judged on its particular facts; and it is far from clear that, where consent or belief in consent was in dispute, it would be harder to elucidate the matter where the parties are married than where they are not. Moreover, such difficulties do not on any view arise in cases where the man simply overrides the woman's manifest objections, or uses brutality or force. We doubt if many would think it right to exclude the latter cases from rape when they arise within marriage; as would be the effect if the immunity were retained simply because of the difficulty of adjudicating upon issues of consent in some other, less clear-cut cases. Finally, even if there were, within marital rape, cases that were difficult to prosecute, that would be no more reason than it is in rape generally for not having such a crime.

H. INVESTIGATION OF THE HISTORY OF THE MARRIAGE

4.56 The majority of the CLRC were concerned that "prosecution for rape might necessitate a complicated and unedifying investigation of the matrimonial history, which in the first place would have to be undertaken by the police, before issues such as the wife's consent and the husband's belief could be assessed."[96]

4.57 This objection to removing the immunity involves two distinct elements. The first is that the public investigation of the intimate details of married couples' relationships is contrary to the interest of marriage as an institution; the second issue is that the process may be distressing and unfair for the parties themselves.

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96. Fifteenth Report, para. 2.69.

4.58 As to the first, a public investigation into the matrimonial history takes place at present where there is a prosecution for a non-sexual offence of violence against the wife; and more important, as we have already pointed out,[97] a failure to provide adequate remedies for wrongful conduct within marriage may not necessarily serve the interest of marriage generally.

4.59 As regards the second question, so far as it affects the wife, every victim of rape faces disincentives of this kind when asserting her legal rights. It seems unlikely that the difficulties of a woman in coming forward would be significantly worse in the case of marital rape than in other cases where the victim is faced with examination of her previous relations with the man; nor, as we point out in paragraph 4.67 below, has recognition of the difficulties faced by victims generally led to doubts about the need for the offence of rape.

4.60 As for the husband, if he has in fact abused the confidence of the marriage relationship by forcing intercourse upon his wife it is difficult to see that he can complain about the history of that relationship being brought into public view. That argument does not, however, apply if the husband is innocent, irrespective of whether the allegations are or are not deliberately false; such an innocent husband will equally have details of his married life revealed in public when he contests the allegations. It is for consideration whether a husband should therefore have the protection of anonymity until conviction.[98] The anonymity of defendants <u>generally</u> in rape cases was

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97. Para. 4.34 above.

98. His wife, as complainant, has this protection indefinitely (see paras. 2.42-2.44 above).

withdrawn in 1988 because it was thought to be anomalous for a defendant not to be named.[99] That objection might not apply to an attempt to alleviate the specially deleterious effects of investigation of the history of the marriage. We invite views on the necessity and desirability of such a provision, bearing in mind that (unless the wife consents to the publication[100]), the husband will often be incidentally protected by the prohibition on identifying his wife.[101]

I. THE RISK OF FALSE ACCUSATION OR BLACKMAIL

4.61 Another possible objection to removing the immunity is that, on the breakdown of the marriage, the wife might threaten to report an alleged rape to the police in order to secure an advantage in negotiations for financial provision or for arrangements concerning children.[102] It is true that, under the present law, a threat to invoke the criminal law may be made by a wife in respect of an alleged non-sexual crime of violence. Nevertheless (it could be argued), a threat to make an allegation of rape is more potent than one of a non-sexual offence, bearing in mind (i) the public opprobrium that a man labelled "rapist" currently attracts, (ii) the virtual certainty of a substantial custodial sentence and (iii) the well-known harsh treatment meted out in prison to sexual offenders by other inmates.[103]

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99. See para. 2.45 above.

100. See para. 2.44 above; n. 103, para. 4.61 below.

101. See further on the latter point n. 103, para. 4.61 below.

102. The CLRC discussed these points in paras. 2.69 and 2.74 of its Fifteenth Report.

103. Moreover, the husband may have to bear in mind the possible publicity that might be given to a trial for rape: it is normally a defence to a charge of the offence created by the Sexual Offences (Amendment) Act 1976, s. 4(1) and (5), of publishing material likely

4.62 Against that, however, must be put the unlikelihood of such a threat ever proving effective.[104] Normally the issue would be consent; and the husband would be likely to be aware, or to receive advice from those representing him in the matrimonial proceedings, that the prosecution would have difficulty in proving the wife's lack of consent since a delay in prosecution or in making a complaint about an alleged rape affords strong presumptive evidence of consent, and the use of blackmailing threats casts great doubt on a witness's credibility. Moreover, in some cases the threat itself would constitute the offence of blackmail.[105]

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103. Continued
to lead to the identification of the complainant in a rape case, that she consented in writing to the publication: 1976 Act, s. 4(5A) (inserted by the Criminal Justice Act 1988, s. 158(3)). On this, see generally para. 2.44 above.

104. Although even under the present law sexual offences exist that, since they can be committed by a man upon his wife, are capable of being the subject of a threat of this kind. They include indecent assault, buggery, and assault with intent to commit buggery: Sexual Offences Act 1956, ss. 14, 12(1), 16(1). We are not aware of any suggestion that for the reason referred to in the text the husband should be immune from prosecution for these offences.

105. By s. 21(1) of the Theft Act 1968 -

> "A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand for menaces is unwarranted unless the person making it does so in the belief -
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> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand." (Emphasis added.)

Although the nature of the act or omission demanded is immaterial, the words "gain" and "loss" in this section relate only to money and other property: s. 21(2), s. 34(2)(a).

4.63 It may also be feared that abolition of the immunity would give rise to the risk of false allegations being made out of spite. That risk exists at present in the context of rape outside marriage, but is not regarded as a reason why the law of rape should not be available. The issue for our consideration is, therefore, whether the danger is likely to be so significantly greater in relation to rape within marriage as to offset such reasons as exist for making the latter conduct criminal.

4.64 As emotions can run high at the break-up of many marriages, it could be thought that a wife would feel especially tempted to make a serious allegation of this nature against her husband in order to punish him for their matrimonial problems. We think, however, that it is necessary to be extremely cautious about making any such assumption in relation to an allegation of rape. The investigation of such an allegation is a notoriously difficult and unwelcome process for the complainant.[106] A false complainant would have to be very determined, and very bitter, to carry the experience through successfully. That would be particularly so because police and prosecuting authorities are likely to scrutinise with extreme care allegations that emerge from an obvious background of dispute and bitterness. In that respect, it may be thought there will be likely to be more evidence to cast doubt on the false allegations of a wife than upon similar allegations made by a casual partner or acquaintance. It is, of course, already open to a wife to make equally serious allegations, for example of unnatural offences or of child sexual abuse, and whether or not the fear expressed above is justified, it is difficult to see how it would be

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106. See the observations of the Heilbron Group, cited in n. 108, para. 4.67 below.

significantly increased by adding rape to the list of allegations which might be made.

4.65 We confess that much of the foregoing is speculation, as is perhaps inevitable. For that reason, we particularly invite comment on the points raised in this section.

J. WOULD A LAW OF MARITAL RAPE BE USED?

4.66 It may be feared that, even if the law were changed to make non-consensual intercourse within marriage criminal, that law would not be of practical importance because of the reluctance of wives to make complaints of rape against their husbands. This fear is in effect the converse of the concern that wives would be over-anxious to report cases of rape in order to gain an advantage in matrimonial disputes; or the concern that marital rape would give rise to false accusations.[107]

4.67 Those who have this fear would seem, however, to overlook the fact that the existence of an offence should tend of itself to deter the proscribed conduct. That objective, general deterrence and the forceful expression of society's disapproval, is one of the main functions of the criminal law. Moreover, even if the fear were well-founded, we would not see it as a reason for not making a change in the law that was desirable on grounds of principle. If conduct is sufficiently serious and undesirable to warrant prohibition by the criminal law, that protection should be potentially available to those who suffer from that conduct, even if many of them, for one reason or another, may be inhibited from setting the criminal process in motion. It is well-known that there are serious difficulties in the way of any woman who seeks to prosecute a complaint of rape,

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107. See paras. 4.61-4.65 above.

which were well summarised in the 1975 Report of the Advisory Group on the Law of Rape chaired by Mrs Justice Heilbron.[108] Recognition of those problems has not led to doubts about the appropriateness of the existence of a law of rape, but rather to attempts to ease the position of a woman who complains of this most serious crime.

4.68 In fact, however, we are not satisfied that the fear is well founded. We doubt, though we will welcome comment on this point, whether a wife who positively wished to pursue a complaint of rape would be significantly more deterred from doing so than is any other woman. That is particularly so if the comparison is made not with violent rapes by a stranger, but with rapes by intimates or current or recent cohabitants. In a recent study comparing rape offences in 1973 and 1985[109] the Home Office Research Unit

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108. Cmnd. 6352. The Group said, at paras. 88-89:

> "It may not generally be appreciated that once a woman sets in train a complaint that she has been raped, she has to undergo a prolonged ordeal. In the first place there will be a police interrogation, one of the purposes of which is to ensure, as far as possible, that she is not making a false charge; indeed unfounded allegations are often cleared up at this stage. Next she has to answer further questioning by the police surgeon ... and to undergo a thorough as well as an intimate and inevitably distasteful gynaecological examination. Furthermore, if her story of the rape is true she will, at this stage, probably be in a state of shock and possibly also have suffered painful injuries: yet she may have to spend many hours at the police station before she is able to return home.
>
> "At the trial, which will take place some considerable time later, she will have to relive the whole unpleasant and traumatic experience. In many cases she will be cross-examined at length. ..."

109. Home Office Research Study No. 105, 1988.

found that between the two years studied there had been a noticeable increase in the number of reported cases of rape by "intimates" (including parental figures, other relatives, friends, ex-partners and lovers). It is at least possible that some of this increase is accounted for by a greater willingness to approach to the police in such circumstances.

4.69 However, on any view, cases that involve situations potentially as difficult as a dispute within marriage (for instance, rape by a parent; or by a long-term cohabitant) do appear to be reported and to be successfully prosecuted.[110] As we have indicated, we doubt whether the administration of a law of marital rape would be significantly more difficult than the administration of many situations that arise under the present law of rape, but we would particularly welcome comment on the factual position from those who are experienced in the operation of the present law.

4.70 We would also welcome comment on whether it should be made explicit that in a charge of rape the wife can be compelled to give evidence for the prosecution, a matter that is not wholly clear in the present law;[111] or alternatively whether she should be able to refuse to give evidence. In our view, the general policy that led to the wife being compellable in cases of violence against her[112] should apply in the case of rape. In particular, we think that it is a protection of the wife against some of the pressures that may apply in any case involving intimates, whether married or not, that at the end of the day she has

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110. Recent such cases include Lewis (1989) 11 Cr App R (S) (rape by father of teenage daughters) and Baker (1989) 11 Cr App R (S) 513 (rape and other sexual offences by stepfather).

111. See para. 2.41 above.

112. Police and Criminal Evidence Act 1984, s. 80(3).

in law no choice as to whether or not to testify. However, as we say, we seek opinion on this issue.

PART V

CONCLUSIONS

A. THE COMMISSION'S PROVISIONAL CONCLUSION

5.1 Having reviewed the matters set out in Part IV, the Commission is of the provisional opinion, before it has had the benefit of considering the comments that it hopes to receive on this Working Paper, that there are no valid reasons for distinguishing between non-consensual sexual intercourse within marriage on the one hand; and, on the other hand, non-consensual sexual intercourse between parties who are not married, or who are married but are subject to one of the circumstances that at present bring such conduct within the crime of rape.[1]

5.2 The Commission's provisional conclusion, on which it seeks comment, is therefore that the present marital immunity in rape should be abolished in all cases.

5.3 The effect of implementing this conclusion would be that, as in the case of a non-husband,[2] a man who had intercourse with his wife without her consent would be guilty of rape if he knew that she did not consent or was reckless as to whether she consented.

5.4 In reaching that provisional conclusion we are aware that on some other occasions when the law of marital rape

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1. See paras. 2.11-2.26 above.

2. See para. 2.7 above.

has been scrutinised it has been suggested that reforms should be adopted that fall short of total abolition of the marital immunity. It may be helpful if we indicate why we have at present rejected those solutions. We do that both to invite comment on those other solutions, and also to give some further indication of why we have reached the provisional conclusion set out in paragraph 5.2 above.

B. RAPE ONLY WHEN THE MARRIED COUPLE ARE NOT COHABITING

5.5. Although the CLRC was divided on the question whether the immunity should be completely abolished, there was -

> "... one proposition that unites us all, namely that, if a satisfactory definition could be achieved, the offence of rape should be extended to all cases where husband and wife are no longer cohabiting. This would be a logical, and modest, extension of the offence to cover bad cases not amounting at present to the offence, for example, where a husband forces his way into his wife's residence after they have ceased to cohabit but where she has not yet had recourse to a court. It is a desire to cover these cases that primarily motivates a few of those Members who would be prepared to extend the offence to all marriages, including where the couple are cohabiting. They doubt whether a satisfactory definition could in fact be achieved but, if it could, they would support it rather than a wholesale extension."[3]

and later:

> "Although all of us are in principle favourably inclined to an amendment of the law to enable a prosecution to be brought for rape where a married couple were not cohabiting at the time of the offence, we are acutely conscious of the difficulties in achieving a satisfactory definition. Nevertheless, we recommend that an attempt be made to find a workable formula. Furthermore, some possibility of uncertainty should not be a final barrier here to a reform that all of us regard as desirable."[4]

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3. Fifteenth Report, para. 2.81.

4. Ibid., para. 2.85.

5.6 Unlike the majority of the CLRC in 1984, when it published its final Report, the majority of that Committee in 1980 (the date of its working paper[5]) considered that to restrict the liability of a husband for raping his wife to cases where the parties are not cohabiting would be wrong in principle. However, before turning to those objections of principle, we explain the preliminary problem of definition.

5.7 According to the formula in section 2(6) of the Matrimonial Causes Act 1973 -

> "A husband and wife shall be treated as living apart unless they are living with each other in the same household ... ."

The formula relates to the question whether the parties to a marriage have been "separated" for the purpose of establishing the facts on which a petition for divorce may be based under section 1(2)(d)[6] or (e)[7] of the Act. Its most conspicuous difficulty lies in determining whether and when spouses living under the same roof can be said to be "living apart" in the sense of living in separate households. It seems from the cases that the test is the same as for the "factum" of desertion, that is, whether one spouse continues to provide any matrimonial services for the other, and whether there is any shared domestic life. In

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5. Working Paper on Sexual Offences, paras. 28-43 (and in particular para. 37).

6. "... the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted."

7. "... the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition."

Mouncer v Mouncer,[8] for example, where the parties slept in separate bedrooms, sexual intercourse had ceased and they led their own lives to a large extent but shared the rest of the house and usually ate their meals together, it was held that the parties were still living together. On the other hand, where the wife went to live with another man and subsequently her husband moved into their house as a lodger because he was ill and could not live on his own, it was held that the parties were not living together in the same household.[9]

5.8 By contrast, however, physical separation, though necessary, is not sufficient. There must also be a recognition by at least one spouse that the marriage is ended, although this decision need not be communicated to the other spouse.[10] Thus, where the parties have been living apart through force of circumstances, but intend to share a home when circumstances permit them to do so, neither can petition for divorce (or for judicial separation[11]) on the basis of the period of separation. The mental element would in particular cause difficulty if the problems referred to in paragraph 5.7 above were sought to be avoided by use of a formula such as "living apart and not under the same roof".[12] As the CLRC pointed out, it could be difficult to decide whether even parties not under the same roof were "living apart" at the time of the alleged offence if there had been several attempts at

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8. [1972] 1 WLR 321. See also Hopes v Hopes [1949] P 227.

9. Fuller v Fuller [1973] 1 WLR 730.

10. Santos v Santos [1972] Fam 247.

11. See para. 2.13 above.

12. This was the formula originally recommended in South Australia: see Appendix B, para. 1.11 below.

reconciliation.[13] The possibilities are demonstrated by Piper v Piper,[14] where the parties separated and sold the matrimonial home, but then the husband began to visit the wife frequently at her home, sometimes having intercourse with her, and spending weekends, sometimes several nights a week, and, on three occasions, a whole week with her. It was held that since the husband was not "making his home in the wife's flat but spending the middle of the week elsewhere for some understandable reason", it could not be said that the parties were living together.

5.9 These difficulties are real enough but not insuperable, particularly if the alternative is to leave the law in its present unsatisfactory state. When the Commission reviewed the CLRC Report as part of its project to draft a complete Criminal Code, it concluded that if, as the CLRC suggested, it was appropriate to make a distinction between cases of marital rape on the basis of cohabitation, then the formula in section 2(6) of the 1973 Act provided a workable test.[15]

5.10 The Commission stressed, however, that -

> "... if we had been charged with formulating the policy for reform of the law on this issue, it is unlikely that our recommendation would have been the same as that of the [CLRC]."[16]

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13. "It is by no means uncommon for the parties to a fragile marriage to separate and come together again in quick succession on a number of occasions": Fifteenth Report, para. 2.84.

14. (1978) 8 Fam Law 243.

15. Law Com No. 177, vol. 2, para. 15.8. The Draft Code provides for exclusion of the immunity in certain other circumstances as well: see para. 3.5 above.

16. Law Com. No. 177, vol. 2, para. 15.8, n. 10.

That remains our view. If, as we have suggested above, women should in principle be protected against unwanted intercourse whether by their husband or by anyone else, and if the trauma and offence of such intercourse may be as great when inflicted by a husband as when inflicted by a stranger or casual acquaintance, or possibly even greater, then there is no reason why the case should be different according to whether the married partners are or are not cohabiting.

5.11 We do not think it relevant or fruitful to speculate on whether non-cohabitant rapes are likely to be worse or more serious cases than cohabitant rapes.[17] However, if such a comparison were to be attempted we have difficulty in accepting it as self-evident that the rape of a cohabitant spouse is of less concern, or open to less objection, than other cases of non-consensual intercourse between spouses. Two considerations that do or may apply between cohabitants are, first, that parties who are still cohabiting do or may still have relations of trust and confidence between them, which the husband breaks by forcing intercourse on the wife; and second, as we pointed out in paragraph 4.24 above, that if the wife is still living in the same household as the husband she is likely to be less able, on a practical level, to escape his attentions than if she inhabits a separate household. We would not, for instance, regard as satisfactory a criminal law that gave no protection to a

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17. Some members of the CLRC, as indicated at para. 2.81 of the CLRC's Fifteenth Report, were attracted by the consideration that it would be sufficient to extend the law to non-cohabitant rapes only, because that would "cover bad cases not amounting at present to the offence, for example, where a husband forces his way into his wife's residence after they have ceased to cohabit but where she has not yet had recourse to a court."

wife who could only avoid unwanted intercourse by leaving her, the matrimonial, home.

5.12 It may also be of some significance that a solution based on "cohabitation" has been adopted in a number of other jurisdictions,[18] but that in some of those jurisdictions the legislation has fairly rapidly been followed by a further reform completely abolishing the immunity. Thus in New Zealand the Family Proceedings Act 1980 provided that the immunity should apply unless at the time of the rape the husband and wife were "living apart in separate residences", but that provision was overtaken by section 2 of the Crimes Amendment Act (No. 3) 1985, which created a generic offence of sexual violation and completely abolished the immunity; and in Victoria the provision in section 5 of the Crimes (Sexual Offences) Act 1980 that the immunity should not apply when a married person was living "separately and apart from his spouse" was overtaken by section 10 of the Crimes (Amendment) Act 1985, which likewise completely removed the immunity. In Western Australia the immunity, having been limited in 1976 to cases where the parties were "separated and not residing in the same residence", was in effect abolished in 1985.

5.13 In summary, therefore, we have not been persuaded that that there are good grounds for treating non-consensual intercourse between cohabiting spouses as sufficiently different, as a category of case, to justify its omission from the law of rape. There may, however, be arguments, or empirical evidence, that we have overlooked in coming to that provisional view. We particularly hope that any such arguments or evidence will be put before us by consultees,

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18. e.g., Victoria, Western Australia and New Zealand. The legislation of these jurisdictions is more fully considered in paras. 1.3-1.5, 1.18-1.20 and 5.1-5.2 of Appendix B below.

so that they can be fully considered before the Commission makes its final report.

C. RAPE ONLY WHEN ACCOMPANIED BY COLLATERAL VIOLENCE OR OTHER ABUSE

5.14 The theory of such a proposal is that non-consensual intercourse between man and wife should only fall under the law of rape in a "serious" case: for instance, as in the formulation currently adopted in South Australia, if the intercourse is accompanied or obtained by criminal assault, threats, indecency or humiliation.[19] There are obvious difficulties in drafting any such provision, and obvious objections to criminal responsibility turning on conditions that are difficult to agree in detail or to define. Here again however the objections to such a proposal seem to us to turn not merely on difficulties of definition but are based on principle.

5.15 Rape exists as a separate crime because non-consensual intercourse is recognised as, in itself, an objectionable act. If there were any doubts that that, rather than any element of collateral violence, is the basis of the law, such doubts have been now set at rest by the recognition that lack of consent, by itself, will found a charge of rape.[20] That being so, it is difficult to see why the law should be different in the case of husband and wife, by requiring there something more than non-consensual intercourse to found a charge of rape. It is interesting to note that the law in South Australia, which is the only extant example of which we are aware of such an approach to the law of rape, was the product of political compromise and

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19. The South Australian provisions are set out in full in para. 1.9 of Appendix B below.

20. See para. 2.2 above.

has been severely criticised by commentators in that jurisdiction.[21]

5.16 The solution adopted by such provisions, of recognising the existence of the crime of rape in these particular circumstances, is also in our view plainly illogical. The basis of that crime is non-consensual intercourse. If such intercourse is deemed not to be criminal if unaccompanied by violence, threats or humiliation, there is no obvious reason why the intercourse should be criminal when those factors are present.

5.17 We thus see very strong objections to any solution that makes non-consensual intercourse between married couples rape only when it is accompanied by collateral violence or other objectionable features. We will again welcome expressions of any contrary opinion.

D. A SEPARATE CRIME OF NON-CONSENSUAL INTERCOURSE WITHIN MARRIAGE

5.18 Such a solution would meet the fears that have been expressed that to bring non-consensual intercourse within marriage under the crime of "rape" might devalue the impact of the latter crime; or alternatively lead to unreasonably severe sentencing of married rapists. Since however, as we explained above,[22] we doubt whether those fears are well founded, we do not accept the need for the creation of any such crime. There are, additionally, positive objections to such a step.

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21. For a full account, see paras. 1.11-1.17 of Appendix B below.

22. Paras. 4.43-4.49.

5.19 To create a separate crime, with a view to lower sentencing, would be to underwrite the view that marital non-consensual intercourse is, as a category of offence, necessarily less serious than the acts at present covered by the law of rape. We indicated in paragraphs 4.16-4.25 above that we are not aware of any good grounds for that assumption. We find convincing in this respect the view of the New Zealand Court of Appeal in R v N[23] that to apply a separate regime of sentencing in the case of marital rape "would be to deny to a woman in that position the rights over her body which are accorded to every other woman including the prostitute" and, we would add, to every man, married or unmarried.

5.20 We also have in mind that the creation of a separate offence in the case of husband and wife would be tantamount to a system of degrees of rape. That possibility was considered by the CLRC in relation to a distinction between violent and non-violent rape and was rejected by them, the Committee saying that, as far as possible, "offences should be stated simply, the maximum penalty being set high enough to take account of varying circumstances."[24] We consider that general view applicable in the particular case of marital rape.

E. RELATED OFFENCES

5.21 We have referred above[25] to the offence, under section 2 of the Sexual Offences Act 1956, of procuring a woman, by threats or intimidation, to have "unlawful sexual

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23. [1987] 2 NZLR 267, 270. The case, and the statutory provisions that it applies, are more fully considered in paras. 5.3-5.5 of Appendix B below.

24. Fifteenth Report, para. 2.49.

25. Para. 2.28.

intercourse", and to the CLRC's proposal for an increase in the maximum penalty for the offence.[26] It would, in our view, be anomalous to abolish a man's immunity from conviction for rape committed upon his wife without at the same extending the offence under section 2 of the 1956 Act to non-consensual marital intercourse. This applies similarly to the offence, under section 3 of that Act, of procuring a woman to have intercourse by "false pretences or false representations".[27]

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26. Para. 2.5.

27. Para. 2.28 above.

PART VI

SUMMARY: OUR PROVISIONAL PROPOSALS AND OTHER SPECIFIC MATTERS ON WHICH COMMENT IS INVITED

6.1 We invite comment on any of the matters contained in, or the issues raised by, this working paper. However, it will be convenient if we here summarise our provisional proposals and a number of other specific matters raised by the paper.

6.2 We provisionally propose the abolition of a man's immunity from conviction for rape committed by him upon his wife.

(paragraph 5.2)

6.3 We further provisionally propose (consequentially) the extension to marital sexual intercourse of the offences under sections 2 and 3 of the Sexual Offences Act 1956.

(paragraph 5.21)

6.4 We invite comment on the provisional proposal set out in the previous paragraphs, and also upon the following possible alternative approaches to reform of the law in this area -

(a) The abolition of the immunity only where the married couple are not cohabiting.[1]

(paragraphs 5.5-5.13)

(b) The introduction of a new offence, consisting in a man's having sexual intercourse with his wife without her consent (the mental element to be as in rape).

(paragraphs 5.18-5.20)

(c) The abolition of the immunity where the non-consensual sexual intercourse is accompanied by violence or other abuse.

(paragraphs 5.14-5.17)

6.5 We also invite comment on the following subsidiary issues, which would arise if the immunity were to be abolished -

(a) whether it should be made explicit that the wife is a compellable witness for the prosecution in a marital rape case;

(paragraph 4.70)

(b) whether in a marital rape case the husband's anonymity should be protected.

(paragraph 4.60)

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1. Or in the other limited circumstances listed in the Draft Criminal Code: see para. 3.5 above.

APPENDIX A

RULING OF AULD J IN HENRY, CENTRAL CRIMINAL COURT, 14 March 1990

No. 891325

THE CENTRAL CRIMINAL COURT

Old Bailey,
LONDON,E.C.4.

Wednesday, 14th March, 1990.

Before:
THE HONOURABLE MR JUSTICE AULD

R E G I N A
v.
BRENTON HENRY

MR M. FORTUNE appeared on behalf of the prosecution.
MR C. CAMPBELL appeared on behalf of the defendant.

Transcript of the shorthand notes of Newgate Reporters Ltd.,
(Official Shorthand Writers to the Court)
Old Bailey, London, EC4.

JUDGE'S RULING ON INDICTMENT

Wednesday, 14th March, 1990.

R U L I N G

[For ease of reference, the paragraphs have been numbered.]

1. **MR JUSTICE AULD:** But for the fact that the defendant and the alleged victim in this case were married at the material time, the offence charged here would be rape. It would probably be the only offence charged. Instead, the defendant faces charges of indecent assault, affray, and false imprisonment, all arising out of the same incident.

2. The prosecution case is that the defendant forced his way into his wife's house and there forced her to have sexual intercourse *per vaginam* with him. It is not alleged that he did, or attempted, any other sexual acts, or that he used violence other than, when they were sitting together on a mattress on the floor, pulling her down on the mattress and lying on her and penetrating her for a few seconds. As soon as she told him that she would allege rape, on her account, he withdrew from inside her and got off. It is not alleged that she struggled, or screamed, or physically resisted him; only that she made plain to him that she did not want to have sexual intercourse with him.

3. The prosecution case is that she submitted out of fear for her own safety, having regard to the violence that he had allegedly subjected her to in the past, and to her anxiety not to upset her two young children who were nearby, and that the defendant, when he did what he did, knew that she did not consent to it.

4. In ordinary circumstances, if a jury were satisfied so that it were sure of that version it could convict the defendant of rape. However, as I have indicated, these two people were married at the material time, and it appears to

be settled law that a man cannot be guilty of rape upon his wife. I say that it appears to be settled law because the courts have always proceeded upon that basis in reliance upon a passage in Hale's Pleas of the Crown, first published in 1736. However, it has been suggested, at least by one commentator, Richard Brooks, in an article entitled "Marital Consent in Rape" in [1989] Crim LR 877, that that proposition, though taken for granted by the courts over the centuries, has no direct judicial authority, save for a decision at first instance, that of Lynskey J, in R v Miller, [1954] 2 QB 282, to which I shall refer again.

5. The rationale for that rule, which has been applied for several centuries, is that there is implied from the married state a consent by both parties to what, for want of a better word, I shall call "ordinary" sexual intercourse. That consent continues to be implied until it is revoked or put aside by certain legal acts which intrude on or interfere with the married state. These include: a decree nisi of divorce; a decree of judicial separation; a separation order incorporating a non-cohabitation provision; possibly a separation agreement; the granting of an injunction, ex-parte or inter-partes, to restrain a husband from molesting his wife; and an undertaking given by a husband who knew of the granting of such an injunction. Authority for that catalogue is to be found in paragraph 20.344 in the current edition of Archbold and the authorities cited in that paragraph.

6. The law, as it stands at the moment, stops there. Whether it should do so, in the conditions of today, is no doubt a matter for serious debate by those responsible for making or changing the law. The law, as it now is, does not entitle a wife to withdraw her consent whilst the marriage subsists and before any of the legal intrusions or processes which I have just mentioned have occurred. Thus, there is authority in the case of R v Steele [1977] 65 Cr App R 22, a

case in the Court of Appeal, that the issue of proceedings by a wife as a preliminary to applying for an ex-parte injunction to restrain the husband from molesting her does not amount to a withdrawal of that consent. Nor does the issue and service by a wife of proceedings for divorce, as was the case here. Authority for that is to be found in the case of R v Miller, to which I have already referred.

7. In an attempt to overcome what many today regard as an unsatisfactory and unjust rule of the law, the prosecution have charged this defendant, first, with indecently assaulting his wife. The matter was opened to the jury, and it seemed to me that the case proceeded upon the basis, that the indecent assault complained of was the act of sexual intercourse itself, the very act that, but for the marriage of the parties, would have constituted the alleged rape. However, for reasons which became apparent as the authorities were considered during the submissions to me at the close of the prosecution case, counsel for the prosecution felt obliged to submit that the indecent assault complained of consisted of the act or acts of the defendant preliminary to the act of intercourse.

8. As I understand it, if Count 1, the charge of indecent assault, were left to the jury, the prosecution would not seek a verdict on the charges of affray or of false imprisonment. But if Count 1 were withdrawn from the jury the prosecution would seek a verdict on one or other of those two counts.

9. The first question for decision by me is whether, in the circumstances in which a charge of rape by a man of his wife would be bad by reason of her consent to sexual intercourse implied by law, a charge of indecent assault based on the same facts might be made out. Putting aside for the moment such authority as there may be on the point, it seems to me that if a wife is deemed in law to consent to

sexual intercourse when, in truth, she is unwilling and when her husband forces her to submit to it, he cannot be guilty of indecent assault any more than of rape. If the law deems her to consent to the act which constitutes the invasion of her body in the course of sexual intercourse, then in logic it should deem her consent to that self-same act, whether it is characterised as rape or indecent assault.

10. There is authoritative support for that view in a commentary by Professor John Smith on the case of R v Caswell [1984] Crim LR 111, which involved quite different facts, and in the premise upon which the Court of Appeal (Criminal Division) proceeded in the subsequent case of R v Kowalski [1988] Cr App R 339, to which I shall refer.

11. In R v Caswell, which concerned so-called preliminaries, extreme and degrading ones, to sexual intercourse, it was held by the Assistant Recorder that they, as well as the act of sexual intercourse which followed, fell within the husband's immunity. I say nothing about the validity of that ruling, given the subsequent decision of the Court of Appeal (Criminal Division) in the case of R v Kowalski.

12. However, Professor Smith, in his valuable commentary on the case, wrote these words:

> "The immunity of a husband from criminal liability for rape of his wife must extend to the acts which he does prior to the act of sexual intercourse, so far as liability to conviction of a sexual offence is concerned. It would make nonsense of the immunity if the husband could be convicted of attempted rape. The acts constituting the attempt would inevitably amount to indecent assaults and it would be wrong to allow the immunity from conviction for rape or attempted rape (while the law continues to recognise it) to be evaded by describing those acts as indecent assaults. In so far as the acts are preliminary to natural sexual intercourse, the position seems to be entirely clear."

13. In R v Kowalski, the court was concerned with a charge of indecent assault by a husband on his wife based upon an act of fellatio, which the husband, as a preliminary to sexual intercourse, forced his wife to undergo at knife point. It is implicit in the judgment of the Court of Appeal (Criminal Division), which was delivered by Ian Kennedy J, that the Court accepted that an act of ordinary intercourse, that is to say per vaginam, if not rape because the parties were married at the time, is equally not an indecent assault.

14. However, it is also clear from the case of R v Kowalski (and this was the issue in that case) that there may be sexual acts, whether preliminary or not to ordinary intercourse, to which a wife is not deemed by her married state to consent. The fellatio in that case was clearly an act which, whatever may have happened in the past between husband and wife, was not an act to which she was deemed to continue to consent once she had withdrawn her consent to "ordinary" sexual intercourse.

15. No such conduct of that description is to be found in this case. The defendant forced his company upon the complainant, on her account, and made plain, despite her obvious unwillingness, that he wanted to have sexual intercourse with her. But the first and immediate preliminary act of a sexual nature alleged is of him pulling her down on the mattress on which they were both sitting together, and climbing on to her. That act or those acts were so proximate to and part of the preparation for the act of sexual intercourse itself that, in my view, no jury could reasonably consider them in a different way from that act. They are not in the category of the quite distinct act of fellatio which was considered in the case of R v Kowalski.

16. I am, therefore, of the view that whether the conduct relied upon here is the act of intercourse itself or the

defendant's conduct preliminary to it, there is no evidence to go before the jury on a charge of indecent assault in Count 1 of the indictment. I should add that a charge of indecent assault based on the preliminaries only, in a case such as this, would be highly artificial and not a worthwhile proxy for a prosecution for rape.

17. If the alleged conduct is not capable of amounting to rape or to indecent assault, may it amount to common assault? I assume, without deciding, that such an alternative verdict would be possible on an indictment for indecent assault. I put it in that diffident way because in paragraph 20.385 of the current edition of Archbold some doubt is indicated about it; and, by section 39 of the Criminal Justice Act 1988, common assault is now a summary offence, though, by section 40, it may be triable on indictment if a count for it is charged with other counts founded on the same or as part of a series of offences.

18. In R v Miller, to which I have referred, Lynskey J, in a trial of charges of rape and assault occasioning actual bodily harm of a wife by her husband, withdrew the charge of rape from the jury at the close of the prosecution case, but left to them the charge of assault occasioning actual bodily harm. It was alleged in that case that the husband had thrown his wife down three times before having sexual intercourse with her and that, afterwards, though she had no physical injuries, she was in an hysterical and nervous state. The judge's reasoning for leaving the charge of assault occasioning actual bodily harm with the jury was as follows:

> "... although the husband has a right to marital intercourse and the wife cannot refuse her consent, and although if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence in the exercise of that right and if he does so he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of that

particular case warrant. If he should wound her he might be charged with wounding or causing actual bodily harm, or he may be liable to be convicted of common assault. The result is that in the present case I am satisfied that the second count is a valid one and must be left to the jury for their decision."

19. With that general approach, I respectfully agree, but the problem lies in drawing the line between the act of forced intercourse to which the wife is deemed to consent and some assault over and above that to which she is not deemed to consent. That line cannot be identified by saying that only force in excess of that necessary to achieve the act of intercourse is chargeable as an assault. That is because the degree of force used and the injuries inflicted are in the main likely to depend upon the degree of resistance put up by the wife. However, there is a line to be drawn, however low in the scale of force used by the husband for the purpose, because of her deemed consent to her will being overborne.

20. The dilemma for the courts is well described by Professor Smith in another passage from his commentary in the case of R v Caswell. I read what he says.

> "The ruling that the husband might be convicted of a common assault is supported by a dictum in Miller where the defendant was convicted of an assault occasioning actual bodily harm but it emphasises the inconsistency of the present law. Assault depends on lack of consent, so the law recognises that the wife did not consent for the purposes of the common assault charge but holds that she has consented irrevocably to the same act as far as the charge of indecent assault is concerned."

In another commentary by the same learned academic, this time on the case of R v Sharples, which is reported in [1990] Crim LR 198, he expresses the same dilemma, though in somewhat different terms. There, he says:

> "An order not to use violence might however be distinguishable because the law distinguishes, albeit illogically, between the intercourse and the force

used to procure it. A husband is not entitled to use violence against his wife - if he does, he commits an assault, even if this is done in order to enable him to have lawful sexual intercourse with his wife to which the law deems him to be entitled."

Richard Brooks in his article in the Criminal Law Review in 1989, to which I have referred, puts the dilemma for the courts in more forceful language. He says, at page 883:

> "'The law implies consent to what took place so far as intercourse is concerned (but only to that extent)', says Lynskey J. Thus he accepts that a husband is not entitled to use force or violence in the exercise of his 'right' but seeks to make a ludicrous distinction between the act of sexual intercourse itself (where consent is implied) and the physical force used to achieve it (where consent is denied)."

The learned author goes on to suggest that the dilemma is to be found in the assumption of the rule, for which, he says, there is no respectable direct authority, that a man cannot rape his wife.

21. I note that in the case of R v Miller there was much more force used than in the present case, and an allegation of actual bodily harm. There is no evidence of any physical injury in this case and, whilst I do not discount the possibility of psychological damage, no injury is alleged.

22. In my view, the acts in this case relied upon by the prosecution, namely, that the defendant pulled his wife down from a sitting position on the mattress and then lay on her to commit the act of sexual intercourse, are not distinguishable from the act of sexual intercourse itself, to which the law deems, contrary to the facts, that the wife has consented. In my view, the case falls well within the line of deemed consent. Accordingly, there is no case that can go to the jury on the alternative possibility of common assault.

23. I make the same comment here that I made about indecent assault, and it is one which counsel for the prosecution has also recognised in his submissions to me. A charge of common assault simply does not reflect the reality of the prosecution case. It is poor proxy for a charge of rape.

24. That point is also made forcefully by Richard Brooks in the article to which I have referred, in a passage which, in my view, is well worth citing. He says this, at page 884:

> "Notwithstanding the undesirability of the law being based upon a fiction and the tangled web this inevitably creates, can the husband's immunity be justified on policy considerations? Is the alternative remedy of an assault charge an adequate one? The answer must be that it is not. If it is as between husband and wife, then why not between cohabitees or, for that matter, between any couple who have had previous consensual sexual relations? The fact is that rape is a far more serious matter than assault and to limit the position to a conviction and sentence for the latter offence when the reality is that the former offence has been committed leaves the criminal law dealing wholly inadequately with what has occurred. The Court of Appeal has stated that rape is an offence requiring an immediate custodial sentence, save in the most exceptional circumstances. In those cases where there have been convictions against husbands for rape (as having come within the fortuitous 'exception' rules) the sentencing has reflected that marital rapes, even if sometimes towards the lesser end of the sentencing scale, are still offences calling for custodial sentences."

25. Similar comments apply to the charges contained in Counts 2 and 3 of the indictment. As to the affray charge in Count 2, not only is it not an appropriate charge for the facts of this case, but it is not maintainable in law on the evidence relied upon by the prosecution.

26. Section 3(1) of the Public Order Act, 1986, provides that a person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as

would cause a person of reasonable firmness present at the scene to fear for his personal safety. An affray may be committed in a private place, such as a bedroom, as alleged here, and when no person of reasonable firmness is actually or likely to be present in the bedroom - and none was here, save for the children. But the prosecution still have to prove first that there was unlawful violence and second that the notional third person present in the bedroom, seeing what was happening, would fear for his own personal safety.

27. Here, the prosecution cannot show, for the reasons that I have given, that such force as the defendant used for the purpose of achieving sexual intercourse with his wife was unlawful. I note in that context that Ian Kennedy J, in the case of R v Kowalski, at page 341, observed, when dealing with the deemed lack of consent, that it could also be argued that the exception could be founded on the use of the word "unlawful" in the definition of the offence to qualify the words "sexual intercourse".

28. As to the second point, what was taking place on the mattress was clearly not something which would have caused a notional third person present in the room to fear for his own safety. In my view, there is no evidence to go to the jury on the charge of affray in Count 2.

29. As to the charge of false imprisonment in Count 3, the false imprisonment alleged is the restraint by the defendant of his wife for a short period when he lay on her on the mattress and was penetrating her. False imprisonment consists of the unlawful or intentional or reckless restraint of a victim's freedom of movement from a particular place. If the act of sexual intercourse which was in progress was not unlawful by reason of the fiction of the law, then the restraint involved cannot be separated from that act to constitute some separate unlawful act. In my view, the charge is unfounded on the facts relied upon by

the prosecution. It is, in any event, wholly inappropriate to the true complaint in this prosecution. My judgment is that there is no evidence to go to the jury on this charge either.

30. It follows that there is no evidence to go to the jury on the indictment.

31. If a charge of rape, or of indecent assault or of common assault is not maintainable, as I have found, it is highly artificial to seek to overcome what may be a serious deficiency in the law by charging offences of affray or false imprisonment in a case such as this. The remedy is to change the law, not to strain it.

32. I note that a way forward is indicated in Clause 87 of the Law Commission's Draft Criminal Code which, read with Clause 89, would make it rape for a husband to have sexual intercourse with his wife without her consent and to do so knowingly in a number of circumstances, as at present, but also "if they are not living with each other in the same household". No doubt that circumstance, too, may be an imperfect or inappropriate line to draw, but some might regard it as a step in the right direction and one which might avoid some of the difficulties and artificialities with which the courts have to deal in cases such as this.

33. That concludes my ruling.

APPENDIX B

THE LAW OF MARITAL RAPE IN OTHER JURISDICTIONS

1. Australia

1.1 Criminal law in Australia is principally a state matter. Such federal legislation as relates to criminal offences, the Crimes Act 1914, does not contain provisions relating to sexual offences.

1.2 The marital rape exemption has been removed completely in five states - namely, Victoria, New South Wales, Western Australia, Queensland and Tasmania.[1] In South Australia there has been a partial removal. These jurisdictions will be dealt with separately.

(a) Victoria

1.3 In 1979 the Victorian Attorney-General announced his intention to review the sexual offences contained in the

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1. The National Conference on Rape Law Reform, held in 1980 in Hobart, Tasmania, passed several resolutions which influenced law reform in a number of Australian jurisdictions. The following resolution was passed at the final plenary session:

   "2. This Conference agrees that any immunity which currently protects men against prosecution for rape within marriage should be abolished, noting that:

   (a) husbands have for many years been liable to be convicted of indecent assault if they in fact rape their wives and this has not led to any 'undermining of family life',

   (b) the abolition of immunity for husbands would emphasise the community's condemnation of sexual violence within the family."

Crimes Act 1958.[2] Changes in the law of marital rape occurred in the context of this review, which altered the existing law as to sexual offences generally. In 1980 the Crimes (Sexual Offences) Act established a system of gradation of sexual offences.[3] Section 46(4) of the Act created the crime of rape with aggravating circumstances.[4] The Act also extended the definition of rape to include penetration by the penis of the anus or mouth of another person, and penetration by either a male or a female person of an object (other than a part of the body) of the vagina or anus of another person, whether male or female.

1.4 The marital rape exemption was removed in two stages. The first was part of the general reform referred to in the previous paragraph. Section 5 of the Crimes (Sexual Offences) Act 1980, which amended section 62(2) of the Crimes Act 1958, provided that

> "Where a married person is living separately and apart from his spouse the existence of the marriage shall not constitute, or raise any presumption of, consent by one to an act of sexual penetration with the other or to an indecent assault (with or without aggravating circumstances) by the other."[5]

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2. McNiff, "Reform of Sexual Offences in Victoria: The Time to Abandon the Victorian Perspective?", [1980] 4 Crim LJ 328, at p. 328.

3. The scheme was less detailed than the one in New South Wales: see paras. 1.6-1.8 below.

4. In s. 2A of the Crimes Act 1958.

5. This section was described as not being "free from interpretative problems", especially in relation to the meaning of "living separately and apart"; see Corns, "Liability of Husbands for Rape-in-Marriage - The Victorian Position", (1983) 7 Crim LJ 102, at p. 112.

1.5 In 1985 the immunity was completely removed by the Crimes (Amendment) Act. Section 10 substituted a new section 62(2) into the principal Act (the Crimes Act 1958); the subsection provides that

> "The existence of a marriage does not constitute, or raise any presumption of, consent by a person to an act of sexual penetration with another person or to an indecent assault (with or without aggravating circumstances) by another person."

(b) New South Wales

1.6 There have been extensive changes in the law of rape in New South Wales, which were brought into effect by the Crimes (Sexual Assault) Amendment Act 1981. The offence of rape was replaced by three categories of sexual assault, determined by the degree of violence used - namely, (a) inflicting grievous bodily harm with intent to have sexual intercourse;[6] (b) inflicting actual bodily harm etc, with intent to have sexual intercourse;[7] and (c) sexual intercourse without consent.[8] The definition of sexual intercourse was also considerably widened.[9]

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6. Category 1: Crimes Act 1900, s. 61B.

7. Category 2: Crimes Act 1900, s. 61C.

8. Category 3: Crimes Act 1900, s. 61D.

9. Crimes Act 1900, s. 61A(1) provides:

> "... 'sexual intercourse' means: (a) sexual connection occasioned by the penetration of the vagina of any person, or anus of any person, by (i) any part of the body of another person, or (ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes; (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person; (c) cunnilingus; or (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c)."

1.7 The 1981 Act also abolished the marital rape exemption. It introduced section 61A(4) into the Crimes Act 1900, which subsection provides that -

> "The fact that a person is married to a person -
>
> (a) upon whom an offence under section 61B, 61C or 61D is alleged to have been committed shall be no bar to the firstmentioned person being convicted of the offence; or
>
> (b) upon whom an offence under any of those sections is alleged to have been attempted shall be no bar to the firstmentioned person being convicted of the attempt."

It is noteworthy that the legislation was also intended to "serve an educative function in further changing community attitudes to sexual assault".[10]

1.8 This legislation has been criticised on the ground that apparently trivial acts between husband and wife could give rise to a prosecution for rape: for example, because of the extended definition of sexual intercourse,[11] a husband may be guilty of rape if he inserts a finger into his wife's vagina when she is asleep.[12]

(c) South Australia

(i) The law

1.9 The marital rape immunity was partially removed by the

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10. Mr Wran, Premier of New South Wales, moving for a second reading of the Crimes (Sexual Assault) Amendment Bill, NSW Hansard, Legislative Assembly, March 18, 1981, p. 4758.

11. See n. 9, para. 1.6 of this Appendix, above.

12. Cunliffe, "Consent and Sexual Offences Law Reform in New South Wales", (1984) 8 Criminal Law Journal 271, at p. 292.

Criminal Law Consolidation Act 1976. Section 12 of this Act amended section 73 of the "principal Act", the Criminal Law Consolidation Act, 1935-1976. Section 73(5) provides that -

> "Notwithstanding the foregoing provisions of this section, a person shall not be convicted of rape or indecent assault upon his spouse, or an attempt to commit, or assault with intent to commit, rape or indecent assault upon his spouse (except as an accessory) unless the alleged offence consisted of, was preceded or accompanied by, or was associated with -
>
> (a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;
>
> (b) an act of gross indecency, or threat of such an act, against the spouse;
>
> (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act;
>
> or
>
> (d) threat of the commission of a criminal act against any person."

1.10 Sexual intercourse is defined to include any activity, whether of a heterosexual or a homosexual nature, which consists of or includes (i) penetration of the vagina or anus by any part of the body of another person or by an object, (ii) fellatio or (iii) cunnilingus.[13] This has had the effect, in relation to marital rape, that, for example, buggery of a wife is criminal only if the acts fall within one of the above categories of section 73(5).

1.11 In 1975 the Government of South Australia asked the Penal Methods Reform Committee (the Mitchell Committee) to report on the law relating to rape and other sexual

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13. Criminal Law Consolidation Act 1935-1975, s. 5, as amended by the 1976 Act. s. 3.

offences.[14] The Committee recommended that a husband should only be indicted for rape where the two parties are living apart and not under the same roof.[15] The report, which was produced in March 1976, stated that it was "anachronistic" in modern times to suggest that a wife must submit to intercourse at her husband's will irrespective of her own wishes.[16] "Nevertheless", it went on to say, -

> "it is only in exceptional circumstances that the criminal law should invade the bedroom. To allow a prosecution for rape by a husband upon his wife with whom he is cohabiting might put a dangerous weapon into the hands of the vindictive wife and an additional strain upon the matrimonial relationship."[17]

1.12 The Committee's recommendation was rejected by the Government, and in October 1976 legislation was introduced in the House of Assembly to abolish the husband's immunity from prosecution.[18] The original proposal was that no

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14. Criminal Law and Penal Methods Reform Committee of South Australia, Special Report - Rape and Other Sexual Offences (1976).

15. Ibid., para. 6.2.1, p. 15.

16. Ibid., para. 6.2, p. 14.

17. Ibid. This analysis was criticised by Australian commentators. For instance, "one wonders how they reconcile this justification with laws proscribing incest, homosexuality or even simple assault": O'Connor, "Rape Law Reform - The Australian Experience, Part I", (1977) 1 Crim LJ 305, at p. 314; "[t]he strain upon a marriage of the existence of a 'rule' that a man may make use of his wife for sexual purposes at any time, despite her own feelings in the matter, was not alluded to": Scutt, "Consent in Rape: The problem of the Marriage Contract", (1977) 3 Monash LR 255.

18. Rape Law Reform, 1980, ed. Scutt, Australian Institute of Criminology, Canberra, ACT, at p. 80. This is a collection of conference papers from the National Conference on Rape Law Reform which took place in May 1980 in Hobart: see above, n. 1 to this Appendix.

person should -

> "... by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with or to indecent assault by that other person."[19]

1.13 The decision to introduce this legislation was taken on the basis of political principles which promote "equal rights and equal opportunity in life for men and women, [and also] the right of every person to self-determination, responsibility for and control over their personal lives".[20] The Office of the Attorney-General also viewed its reform proposals "as playing a crucial role in community education, or in modern parlance 'public consciousness raising'".[21]

1.14 The Opposition in the House of Assembly objected that the legislation would have no practical effect -

> "it will not save one marriage relationship; it will not save one woman from repeated attempts and repeated subjection to these forcible efforts at sexual intercourse ... Changing the criminal law will not help in the bedroom, and it will not help within the marriage in this case."[22]

1.15 When the Bill went to the Legislative Council in November 1976, an amendment was proposed by the Opposition

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19. Ibid., at p. 44.

20. Ibid., at p. 192.

21. Ibid., at p. 193.

22. Sallmann and Chappell, Rape Reform in South Australia: A Study of the Background to the Reforms of 1975 and 1976 and of their Subsequent Impact, Adelaide Law Review Research Paper No 3, Adelaide Law Review Association, University of Adelaide, 1982, at p. 28, quoting Dr Tonkin for the Opposition. See 1976-77 Parliamentary Debates (SA) Vol 2, 1829 (19th October 1976).

which provided that a husband was not to be indictable for rape (except as an accessory), unless the alleged offence involved an assault or the threat of an assault occasioning actual bodily harm, the threat of a criminal act against a child or a relative of the wife, or oral or anal intercourse.[23] This amendment was carried in the Legislative Council. However, when the bill was returned to the House of Assembly it was rejected in its amended form. The deadlock created by the rejection was resolved by a conference of managers from the House of Assembly and the Legislative Council. This conference, held on 29 November , drafted the rape-in-marriage clause in the form it appears in section 73(5) of the Criminal Law Consolidation Act 1935-76.[24]

(ii) Criticisms of the law

1.16 We are not aware of any cases under section 73(5) in the law reports, and our enquiries suggest that it has not given rise to any difficulties in practice. The new provisions have, however, been severely criticised in Australia, not only because of the vagueness with which they are expressed but also on grounds of principle. In particular, it has been argued that (i) if non-consensual intercourse is objectionable it should be punished whether or not it is accompanied by violence; and (ii) the possibility, under section 73(5)(c) of non-consensual intercourse being rape if it is associated with humiliating acts is otiose and indeed insulting, on the ground that the requirement of humiliation is "fulfilled by the very act of non-consensual intercourse".[25] Reference is made by

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23. Sallmann and Chappell (1982), pp. 29-30.

24. Sallmann and Chappell (1982), pp. 30-31.

25. Scutt, (1977) 3 Monash LR, at pp. 279-80.

commentators to R v Fraser,[26] a New South Wales decision -

> "[today there is] a greater appreciation of ... the cruel invasion of human privacy, which is involved in the rape of a woman. The recognition of a woman's right to sexual freedom and sexual equality ... has brought even stronger revulsion against the humiliating denial of that freedom and equality which is involved in rape."[27]

1.17 A past Commissioner of the Law Reform Commission of Victoria, Professor Sallmann, concluded a paper given to the National Conference on Rape Law Reform in Hobart in May 1980[28] with the suggestion that -

> "it is far simpler to remove the immunity altogether than attempt to partially remove it by hedging the main provision about with various qualifications and conditions such as in South Australia ... This legislation should be scrutinised extremely carefully to avoid making the same mistakes."[29]

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26. [1975] 2 NSWLR 521. This case, before Wootten J, concerned an application for compensation for psychological injury, under s. 437 of the Crimes Act 1900, by a victim of rape where the accused had pleaded guilty. Wootten J made the remarks cited in the text in the course of determining how to set the level of compensation.

    It may be of interest that the learned judge also said -

    > "The community it seems to me, is coming to have some appreciation of the terrible psychological wound involved when male violence and aggression forces a woman's participation in an act which, when voluntarily and lovingly undertaken, can be one of the most transcending of human experiences": [1975] 2 NSWLR 521, 525.

27. Ibid., at pp. 524-25.

28. The paper is in Rape Law Reform (above, n. 18 to this Appendix), at p. 84.

29. Ibid., at p. 84.

(d) Western Australia

1.18 Before 1976 there was complete statutory immunity from prosecution for marital rape. In that year the Western Australia Criminal Code, section 325, which laid down the statutory definition of rape, was amended to limit the scope of the marital rape immunity. Section 2 of the Criminal Code Amendment Act (No.3) 1976 removed the immunity in the case where the husband was separated from the wife and the parties were "not residing in the same residence".

1.19 The law on sexual offences was radically altered by the Acts Amendment (Sexual Assaults) Act 1985. This introduced into the Criminal Code provisions creating two tiers of assault: (i) sexual penetration without consent[30] and (ii) sexual penetration without consent in circumstances of aggravation.[31] The new offences do not refer to any relationship between the parties; and the 1985 Act, section 10, repealed section 325 of the Code, which contained a partial immunity from prosecution for husbands.

1.20 Section 324I of the Criminal Code provides that the accused's spouse is a competent and compellable witness in a trial for a sexual offence.

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30. s. 324D of the Criminal Code of 1913. Sexual penetration is defined broadly in s. 324F as penetration of vagina or anus of any person with any part of the body of another person or an object manipulated by another person, fellatio or cunnilingus.

31. s. 324E. Aggravating circumstances are defined in s. 324H as instances where (i) the offender does bodily harm to the victim; (ii)the offender is armed or pretends to be; (iii) the offender does an act "which is likely seriously and substantially to degrade or humiliate the victim"; (iv) the offender acts with another person or persons; or (v) the victim is aged 16 or less, or 60 or more.

(e) Queensland

1.21 The Criminal Code, Evidence Act and Other Acts Amendment Act 1989, section 31, abolished the marital immunity. Previously, marriage was a complete bar to prosecution.

1.22 The offence of rape is now defined in section 347 of the Criminal Code as follows -

> "Any person who has carnal knowledge of a female without her consent or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape."

(f) Tasmania

1.23 Before the enactment of section 18 of the Criminal Code Amendment Act (Sexual Offences) Act 1987, which abolished the husband's immunity, marriage was a total bar to prosecution.

1.24 Since the marital exemption was in statutory form, there did not develop, as in England and Wales, a body of law which created exceptions to the general principle. In 1983, in Bellchambers v. The Queen[32] two judges in the Tasmanian Court of Criminal Appeal, Everett and Neasey JJ, "described the common law immunity from prosecution for husbands as a "generally discredited and obsolete principle of the common law".[33] The then provisions in Tasmania were

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32. 7 Crim LJ 291.

33. Trial transcript pp. 5-6; see (1983) 7 Crim LJ 291, at p. 292.

described as expressing the "worst of both worlds",[34] because, as Everett and Neasey JJ said in their joint judgment,

> "... the existing law of Tasmania can be seen as an unacceptable statutory expression of an archaic, unjust and discriminatory rule, which is not only subject to the criticism levelled against the basis of the common law principle itself but also lacks the ameliorative effect of the common law qualification that the wife's implied consent may be revoked."[35]

1.25 A Report by the Tasmanian Law Reform Commission in 1982[36] recommended that the marital rape immunity should be abolished.[37] This conclusion was supported by six arguments in paragraph 14 of the Report. A summary of these arguments is as follows. First, "the immunity of husbands is archaic, unjust and unequal in the treatment of the sexes."[38] Second, the immunity creates anomalies which make the law appear "ridiculous".[39] Third, the Law Reform Commission contended, domestic violence should be officially discouraged: the law should condemn and not condone domestic sexual violence.[40] Fourth, the "fear of unfounded and malicious prosecutions is not a valid and sufficient reason to retain the immunity, for the criminal law has sufficient

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34. Commentary on the case in (1983) 7 Crim LJ 291, at p. 292.

35. Trial transcript, p. 5; see (1983) 7 Crim LJ 291, at p. 292.

36. Tasmanian Law Reform Commission, Report and Recommendations on Rape and Sexual Offences, Report No. 31, 1982.

37. Para. 17, Recommendation 1.

38. Para. 14(a).

39. Para. 14(b).

40. Para. 14(c).

safeguards ...".[41] Fifth, arguments over difficulty of proof are not sufficiently persuasive since similar objections apply to other areas of the criminal law.[42] Finally, "fears that family life may be undermined and prospects of reconciliation diminished by abolition of the immunity ignore the effect of subjecting an unwilling wife to sexual intercourse."[43]

1.26 The Report went on to reject "compromise solutions" which allow prosecution where the couple are living apart or where one has filed for a divorce: "such solutions are complicated and confusing or create definitional problems."[44] Furthermore, the Report pointed out, it is not always economically possible for wives to find other accommodation, and yet if this is the case they are "denied the protection of the law".[45] The Commission concluded that compromise solutions were

> "objectionable in principle. They fail to acknowledge that married women should be autonomous individuals with rights equal to other citizens."[46]

1.27 The marital immunity was removed by section 18 of the Criminal Code Amendment (Sexual Offences) Act 1987: now section 185 of the Criminal Code[47] provides that -

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41. Para. 14(d).

42. Para. 14(e).

43. Para. 14(f).

44. Para. 15. The Report refers specifically to the South Australian provisions as an example of the difficulties encountered by adopting compromise solutions.

45. Para. 15.

46. Para. 15.

47. Contained in the Criminal Code Act 1924.

"Any person who has sexual intercourse with another person without that person's consent is guilty of [rape] ... ."

2. Canada

2.1 Formerly, section 143 of the Canadian Criminal Code provided that -

> "A male person commits rape when he has sexual intercourse with a female person not his wife,
>
> (a) without her consent, or
>
> (b) with her consent if the consent
>
> (i) is extorted by threats or fear of bodily harm,
>
> (ii) is obtained by personating her husband, or
>
> (iii) is obtained by false and fraudulent representations as to the nature and quality of the act."

2.2 In 1978 the Law Reform Commission of Canada in Working Paper 22, "Sexual Offences", recommended (at p. 17) that the spousal immunity in section 143 should be abolished in relation to spouses who were not cohabiting; but the Commission did not achieve consensus over cohabiting married couples. However, as "the great majority of those consulted ... on this question favoured total abolition of the spousal immunity,[48] considering that it reflected "an outlook no longer in vogue",[49] the Commission's final report recommended that the spousal immunity should be completely abolished, observing -

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48. Law Reform Commission of Canada, Report No. 10, Sexual Offences (1978), p. 16.

49. Ibid.

"Difficulties of proof do not appear to be insurmountable and the danger of groundless accusations made from motives of revenge or as preliminaries to divorce or separation proceedings may be counter-balanced by stricter exercise of discretion in assessing the appropriateness of prosecutions. Furthermore, as experience has amply demonstrated, groundless or ill-founded prosecutions have little chance of passing through the filtering processes implicit in our legal system and present-day criminal procedure."

2.3 The immunity was abolished in 1982 by the Criminal Law Amendment Act (S.C. 1980-81-82, c. 125). The Act replaced the crimes of rape, attempted rape, sexual intercourse with the feeble minded, indecent assault on a female, and indecent assault on a male with three new offences. They were: (i) (simple) sexual assault;[50] (ii) sexual assault where the defendant in committing the assault carries, uses or threatens to use a weapon; threatens to cause bodily harm to a person other than the complainant; causes bodily harm to the complainant; or is a party to the offence with any other person;[51] and (iii) aggravated sexual assault where the defendant in committing the assault wounds, maims, disfigures, or endangers the life of, the complainant.[52] Section 278 of the Criminal Code provides that a person may be charged with any of these offences in respect of his or her spouse "whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred."

2.4 An essential element of these offences, assault, is defined in the Code;[53] but there is no statutory definition

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50. Canadian Criminal Code, s. 271.

51. Ibid., s. 272.

52. Ibid., s. 273.

53. Ibid., s. 265(1).

of the term "sexual". This has to be ascertained from the common law: in "general terms a sexual assault is an assault under section 265(1) committed in circumstances of a sexual nature such as to violate the sexual integrity of the victim."[54]

2.5 The Canadian legislation makes no distinction between penetration and other sexual acts. In Working Paper No. 22, the Canadian Law Commission stated that one of its objectives was "to direct attention away from rape as a sexual offence and towards the right of every person to be free from physical assault."[55] The Commission in its final report stated that "to retain penetration as a distinct element of one of the offences would be to emphasise the sexual character of the proscribed behaviour rather than to stress the aspect of violence or threatened violence."[56] The Commission also observed that "because the value to be protected is the integrity of the person, the law should admit no exception on the mere pretext that an official act has sanctioned a legal relationship between two persons."[57]

2.6 Since these offences cover a wide range of acts, it is left to the courts to decide the relative seriousness of particular cases. In R v Gleason[58] the defendant was convicted of sexually assaulting his wife, having forced sexual intercourse upon her. At the time the couple were still living in the same house but, having previously

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54. Watt and Fuerst, Tremeear's Criminal Code 1990, p. 421.

55. Law Reform Commission of Canada, Working Paper No. 22, Sexual Offences (1978), p. 21.

56. Law Reform Commission of Canada, Report No. 10, Sexual Offences (1978), p. 14.

57. Ibid., p. 16.

58. 1987 1 YR 106.

decided to separate, in separate rooms. Stuart TCJ rejected the proposition that it was less serious to assault a friend or spouse than to sexually assault a stranger. He said -

> "Whereas each case must turn on special facts, the aggravating circumstance of the sexual assault against a person sharing the same home would generally, as it does in this case, involve a breach of trust. Someone who shares the same home has won the victim's trust and is given ready access to the privacy and protection of the victim's home. In this case, the offender abused his special status and breached the trust and confidence arising from his cohabitation and relationship with the victim."[59]

3. Republic of Ireland

3.1 In 1988, the Law Reform Commission of Ireland published a Report on the law of rape, in which it expressed doubts about whether the marital rape exemption existed in Irish law.[60] The Irish courts have never had occasion to consider the issue. There may also be constitutional grounds for supposing that the marital rape exemption had not survived in Irish law since the enactment of the Irish Constitution in 1937.[61] The conclusion reached in the 1987 Consultation Paper was that if the marital rape exemption did exist in Irish law, it was "confined to circumstances where the spouses are cohabiting and there are no separation proceedings in being, or even, perhaps, in contemplation."[62] The Commission's final, 1988 report recommended that the exemption be abolished insofar as it still existed.

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59. 1987 1 YR 110, para. 14.

60. Law Reform Commission of Ireland, Rape and Allied Offences, LRC 24-1988, para. 18, pp. 9-10.

61. Law Reform Commission of Ireland, Consultation Paper on the Law of Rape (1987), p. 12.

62. Ibid.

3.2 The Criminal Law (Rape) (Amendment) Bill 1988, a Bill on the general law of rape containing a clause abolishing the marital rape exemption, was passed by the Seanad Eireann on 8 March 1989 and was making progress through the Dail until the last general election was held. The Bill has not yet been reintroduced into the Dail. Clause 4 of the Bill, as passed by the Senate, provides -

> "(1) Any rule of law by virtue of which a husband cannot be guilty of the rape of his wife is hereby abolished.
>
> "(2) Criminal proceedings against a man in respect of the rape of his wife shall not be instituted except by or with the consent of the Director of Public Prosecutions."

4. Israel

4.1 In 1980, the Israeli Supreme Court held in Cohen v State of Israel[63] that a husband may be convicted for raping his wife, and that English common law in that regard, in so far as it treated the marriage relationship as conferring on the husband a right to impose his sexual will on his wife, was inapplicable to residents of the Jewish faith in Israel.[64] Bechor J, who gave the judgment of the court, viewed the doctrine of "submission" as sufficient "to outrage human conscience and reason in an enlightened country in our times."[65]

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63. (1981) (III) 35 PD 281. A report of this case has proved to be unavailable in this country.

64. Cited in "A Wife's Right to Say No", (1981) 55 ALJ 59, at p. 60.

65. Ibid.

5. New Zealand

5.1 The Crimes Act 1961, section 128(3), as amended by the Family Proceedings Act 1980, provided that an immunity should apply unless at the time of the rape the husband and wife were "living apart in separate residences". However, a 1983 report, commissioned by the New Zealand Minister for Justice, concluded that there were "no real arguments of logic or principle to justify the present immunity"; and that there were, conversely, "positive arguments for abolishing it".[66]

5.2 The main points considered in the report can be summarised as follows -

(a) Whatever the historical basis for the immunity, "it is obviously untenable in the present day. It is unreasonable and contrary to common sense to infer that a wife, by marrying her husband, intends to make herself available to him for the purpose of intercourse whenever he wishes."[67]

(b) Arguments based on notions about the sanctity of marriage and the privacy of the marriage bedroom are fundamentally flawed. The law already invades the bedroom, for example in cases of buggery. Furthermore, a husband who has non-consensual intercourse with his wife can be charged with assault. It is "therefore unrealistic to argue that a law prohibiting rape in marriage will destroy the

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66. Warren Young, Rape Study, A Discussion of Law and Practice (1983), p. 121.

67. Ibid., p. 119.

institution of marriage, when the law already proscribes such behaviour."[68]

(c) "The experience of overseas jurisdictions which do not have the marital rape exemption also indicates that the fear of fabricated charges or indiscriminate prosecution by wives is without foundation."[69]

(d) Arguments over difficulty of proof apply equally to other areas of the law. There is "value in providing a symbolic expression of society's disapproval, and the law should not turn a blind eye to injurious acts merely because they are difficult to prove."[70]

(e) There is little evidence to support the view that the harm from marital rape is necessarily less severe than that caused to other victims. Seven victims of marital rape were interviewed at length in this study. Although all had been living in violent relationships for a long period of time, "they nonetheless reported experiencing real and severe physical and mental anguish, including feelings of terror, helplessness, shame and degradation."[71]

(f) "The present position gives the impression of failing to protect the personal integrity of the wife, or to treat her on an equal footing with other women.

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68. Ibid., p. 120.

69. Ibid.

70. Ibid.

71. Ibid., p. 121.

It possibly perpetuates the view that the wife should be dependent upon and submissive to her husband."[72]

5.3 New Zealand completely abolished the marital rape immunity by section 2 of the Crimes Amendment Act (No. 3) 1985, and created a generic offence of sexual violation, one species of which was the offence of rape. The Crimes Act 1961, section 128(4), as amended by the 1985 Act, section 2, now provides -

> "A person may be convicted of sexual violation in respect of a sexual connection with another person notwithstanding that those persons were married to each other at the time of the sexual connection."

5.4 As to sentence, the Crimes Act 1961, section 128B(2), as amended by the 1985 Act section 2, provides -

> "Every one who is convicted of sexual violation shall be sentenced to imprisonment unless, having regard to the particular circumstances of the offence or of the offender, including the nature of the conduct constituting the offence, the Court is of the opinion that the offender should not be so sentenced."

5.5 In R v N[73] the Court of Appeal considered whether the court should apply a separate regime of sentencing in cases where the parties are married. It concluded that it should not. Delivering the judgment of the Court, Casey J stated -

> "We are firmly of the view that in cases of this nature no separate regime of sentencing is called for simply because the parties are married or have been in a continuing sexual relationship. To do so would deny to a woman in that position the rights over her body which are accorded to every other woman including the prostitute ... . Parliament has made no distinction in the penalties between spousal and other kinds of rape, and the sense of outrage and violation

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72. Ibid.

73. [1987] 2 NZLR 268.

experienced by a woman in that position can be equally as severe."[74]

He continued -

> "Factors relevant to a penalty may lie in the degree and duration of the distress experienced by some women, who may be able to cope better with the consequences of an attack by a man with whom they have grown accustomed to having sexual intercourse. ... An offender's perception of his culpability may be genuinely influenced by cultural or ethnic attitudes to marital rights and obligations, or there may have been a continuing history of some degree of non-consensual intercourse previously tolerated by his wife or partner. Such considerations must vary greatly with circumstances and personality and cannot be evaluated to factors of general application. Nor can the Court overlook the need to impose a penalty which will be an adequate deterrent to the offender and others, and which will reflect society's denunciation of this conduct."[75]

6. Scotland

6.1 Rape in Scots law is the carnal knowledge of a woman's person, forcibly and against her will.[76] A recent decision of the High Court of Justiciary has made it clear that a husband is not immune from prosecution on a charge of rape of his wife, and that in such a case "the only question is whether or not as a matter of fact the wife consented to the acts complained of."[77] Previously, the law had been generally understood to be represented by Baron Hume's

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74. [1987] 2 NZLR 270, line 44.

75. [1987] 2 NZLR 270, line 53.

76. Baron Hume, Commentaries on the Law of Scotland Respecting Crimes, 4th ed. (1844), i, 301; Stallard v HM Advocate 1989 SCCR 248, 251; 1989 SLT 469, 471.

77. Stallard v HM Advocate 1989 SCCR 248, 254; 1989 SLT 469, 473.

"unequivocal statement"[78] indicating that a husband could be guilty of aiding and abetting the rape of his wife by another man but not be guilty as a principal -

> "This is true without exception even of the husband of the woman; who, though he cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort, may however be accessory to that crime ... committed on her by another."[79]

6.2 The law was initially extended by two decisions by trial judges in cases where the husband was tried for the rape of the wife at a time when the parties were not living together. In HM Advocate v Duffy[80] the trial judge declined to affirm that a husband in no circumstances could be guilty of the rape upon his wife. In HM Advocate v Paxton[81] the trial judge expressed the view that marriage implied the "surrender" of the wife's person to her husband and that surrender was recalled where she had withdrawn herself from her husband's society.

6.3 In Stallard v HM Advocate, however, the High Court held that the fiction of implied consent by a wife to intercourse with her husband as a normal incident of marriage had "no useful purpose to serve today in the law of rape in Scotland".[82] The Court pointed out that rape had "always been essentially a crime of violence and indeed no

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78. Ibid., at pp. 251 and 471, per Lord Justice-General Emslie.

79. In the fourth edition of Hume on Crimes, edited by Bell, this statement appears on p. 306 of volume i where the subject in hand is art and part guilt (i.e. aiding and abetting) of abduction and rape.

80. 1982 SCCR 182; 1983 SLT 7.

81. 1984 JC 105; 1984 SCCR 311; 1985 SLT 96.

82. Stallard v HM Advocate 1989 SCCR 248, 254; 1989 SLT 469, 473, per Lord Justice-General Emslie.

more than an aggravated assault".[83] The Court considered that if Hume meant that a wife expressly or impliedly consented to sexual intercourse with her husband as a normal incident of marriage, this provided no justification for his statement, as rape was no more than an aggravated assault and, even in Hume's time, a husband who assaulted his wife enjoyed no immunity. If, alternatively, the court continued, Hume meant that by marriage a wife consented to intercourse against her will and obtained by force, it was doubtful whether that had ever been contemplated by the common law which was derived from the canon law. But whatever Hume had meant, any justification for his statement of the law must now be taken to have disappeared altogether given the change in status of women -[84]

> "[t]here is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault."[85]

6.4 The Court in Stallard saw no merit in various "public policy" arguments advanced by counsel for retaining the immunity. In the view of the Court, Hume's original justification for the immunity was not based at all upon

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83. Ibid., at pp. 253, 473.

84. 1989 SCCR 248, 254; 1989 SLT 469, 473 (per Lord Justice-General Emslie) -

> "A husband and wife are now for all practical purposes equal partners in marriage and both husband and wife are tutors and curators of their children. A wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on the part of her husband. She may rely on such demands as evidence of unreasonable behaviour for the purposes of divorce. A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule."

85. Ibid.

such public policy considerations. Nor would the investigation of an allegation of rape by a husband upon his wife in the matrimonial home have any more undesirable consequences than the investigation of an indecent assault. Additionally, the court considered that

> "If a wife does change her mind after complaining of rape to the criminal authorities, there is little doubt that a prosecution of her husband would not be insisted in."[86]

6.5 The result of Stallard appears to be that in Scotland, where a wife alleges rape against her husband, "the only question is whether or not as matter of fact the wife consented to the acts complained of".[87] The court accepted that proof of rape in marriage would in many situations be difficult, but observed that that was no reason for saying that a charge against a man of raping his wife while the parties were still cohabiting was not relevant for trial.[88]

7. United States of America

(a) Provisions for sexual offences in the Model Penal Code

7.1 The laws in the various jurisdictions in the United States are best described by reference to Article 213.1(1) of the American Law Institute's Model Penal Code (the

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86. 1989 SCCR 248, 255; 1989 SLT 469, 474 (per Lord Justice-General Emslie).

87. 1989 SCCR 248, 254; 1989 SLT 469, 473 (per Lord Justice-General Emslie).

88. 1989 SCCR 248, 255; 1989 SLT 469, 474 (per Lord Justice-General Emslie). In Duffy, Paxton (para. 6.2 above) and Stallard (para. 6.3 above) the accused were acquitted by the jury.

"MPC").[89] This defines the proposed crime of rape as follows -

> "A male who has sexual intercourse with a female not his wife[90] is guilty of rape if:
>
> (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
>
> (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
>
> (c) the female is unconscious; or
>
> (d) the female is less than 10 years old.
>
> "Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree."

Article 213.0 defines sexual intercourse as including "intercourse per os or per anum, with some penetration however slight; emission is not required."

7.2 Rape can thus be a felony of either the first or the second degree. The actor commits rape in the second degree only if (i) there is no serious bodily injury and (ii) the victim has been his voluntary social companion and has previously permitted him "sexual liberties"; in other cases,

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89. American Law Institute, Model Penal Code, Official Draft (1985 ed.). The Commentary is drawn from the 1980 version. The 1985 Official Draft deals with the provisions of the Model Penal Code in much less detail than the previous draft.

90. Emphasis added.

he is guilty of first-degree rape. There is no elaboration in the Commentary of the term "sexual liberties".

7.3 There is no crime of simple non-consensual intercourse: if a sexual assault does not fall within the requirements of Article 213.1, it may constitute the lesser crime of gross sexual imposition, described in the next paragraph.

7.4 "Gross sexual imposition" is a felony of the third degree. This is defined in Article 213.1(2), which provides that -

> "A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:
>
> (a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or
>
> (b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of the conduct; or
>
> (c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband."

7.5 In addition, the Model Penal Code provides for the extension of the marital rape immunity, so that neither a husband nor a male cohabitant can be convicted of rape or of gross sexual imposition. Article 213.6(2)[91] provides -

> "Whenever in this Article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses

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91. The Commentary on Article 213.6 in the 1980 Draft implies that this Article collates general provisions which were dealt with in various sections of Article 213 in the tentative draft of 1955.

living apart under a decree of judicial separation." (Emphasis added.)

7.6 Article 213.6 is intended only to cover persons in a relationship of "common-law" marriage and persons who have purported to contract a marriage that is for some reason invalid. It is not intended to cover all actors who have previously enjoyed sexual relations, even on a regular basis.

7.7 In relation to married couples, Article 213.6(2) distinguishes between those living apart under an informal separation arrangement and those living apart under a decree of judicial separation. In the former case there can be no prosecution, while in the latter case there may be. The rationale of this distinction between formal and informal separation is that

> "it is important to draw a line somewhere and informal separation was thought to involve a substantial possibility of resumption of consensual relations so as to bring it within the reasoning behind the spousal exclusion."[92]

(b) Reasons for the spousal/cohabitants exemption, and the issue of voluntary social companions

7.8 The MPC excludes wives and cohabitants from the crime of rape altogether, and excludes from first degree rape voluntary social companions who have permitted the (male) actor sexual liberties in the past, provided that serious bodily injury has not been inflicted on them. We refer further to the issue of voluntary social companions because of the strong theoretical links between the rationale of this provision and that of the provision relating to wives and cohabitants.

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92. MPC, 1980 draft, Article 213.6, Comment 3, p. 418

7.9 The different treatment for women who fall within one of these categories seems to be based primarily on the perceived effect on consent of the fact of past (or continuing) sexual contact. The Commentary states that "the existence of a prior and continuing relation of intimacy, whether formalized by ceremony or achieved by long practice, is not irrelevant to the concerns of the law of rape."[93] In relation to voluntary social companions -

> "when previous sexual liberties have been allowed and the persons involved are voluntary companions on the occasion of the offense, the gravity of the wrong is arguably less severe. ... [T]he fact that ... sexual liberties have not been permitted in the past is strong objective corroboration of the fact that the sexual act was accomplished by imposition."[94]

7.10 In determining the appropriate gradation for these offences, reference was made to three factors: (i) the culpability and dangerousness manifested by the actor; (ii) the presence or absence of factors objectively verifying these conditions in the actor and (iii) the degree of harm inflicted upon the victim. Taking into consideration these three factors in relation to rape as a felony in the second degree, the fact of prior companionship "reduces confidence in the conclusion of aggression and nonconsent, and seems relevant as well to the degree of injury inflicted and the general dangerousness of the actor."[95]

7.11 The retention of the spousal exemption, as well as its extension to cohabitants, is justified in several ways. The first justification is that marriage (or an equivalent relationship) implies a generalized consent which is valid

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93. MPC, 1980 draft, Article 213.1, Comment 8(c), p. 344.

94. Ibid., Comment 4(a), p. 307.

95. Ibid., Comment 2, p. 280.

until revoked. It is stated that "the relationship itself creates a presumption of consent".[96] The 1980 Commentary moves directly from declaring that there is a presumption of consent to asserting the desirability of the absolute marital rape immunity.

7.12 Secondly, the Commentary states that "the major context of which those who would abandon the spousal exclusion are thinking ... is the situation of rape by force or threat." It is concerned at the criminal law being thrust into the ongoing process of adjustment in the marital relationship -

> "Behavior of this sort within the marital relationship is no doubt unattractive, but it is a risky business for the law to intervene by threatening criminal sanctions. Retaining the spousal exemption avoids this unwarranted intrusion of the penal law into the life of the family."[97]

7.13 The third justification for the spousal exemption is that the experience of degradation and violence by the victim is qualitatively different if the husband is the aggressor -

> "The character of the voluntary association of husband and wife, in other words, may be thought to affect the nature of the harm involved in unwanted intercourse."[98]

(c) Adoption of the Model Penal Code's approach by state legislatures

7.14 State legislation that contains a spousal exemption

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96. Ibid., Comment 8(c), p. 344.

97. Ibid., Comment 8(c), p. 345.

98. Ibid., Comment 8(c), p. 346.

"follows the essential idea of the Model Code provision",[99] but draws the line for immunity at different points in the process of separation: for example, Idaho (legally separated or living apart for 180 days); Nevada (filed for separate maintenance); Arizona (a spouse is defined as "legally married and cohabiting"); Colorado ("living apart, with intent to live apart whether or not under judicial separation"); Maine ("living apart under a de facto separation").[100]

7.15 Some States have expanded the exemption: for example, Pennsylvania to persons "living as husband and wife regardless of the legal status of their relationship"; Texas to persons "cohabiting, regardless of whether they hold themselves out as husband and wife"; Alabama and Minnesota to all cohabiting adults without regard to the sex or marital status of the parties.[101]

7.16 Some states however have completely removed the exemption; for instance, Nebraska, Florida and New Jersey. Others have abolished the immunity for rape and other serious sexual offences but retained it for lesser offences (for example, Iowa and Michigan).[102]

7.17 The marital rape exemption has been considered on a number of occasions by the courts. In Warren v State,[103]

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99. MPC, 1980 draft, Article 213.6, Comment 3, p. 419.

100. Ibid., n. 21, and Article 213.1, Comment 8(c), p. 343, n. 191.

101. MPC, 1980 draft, Article 213.6, Comment 3, p. 419, nn. 22 and 23.

102. MPC, 1980 draft, Article 213.1, Comment 8(c), p. 343, n. 191.

103. 336 S.E.2d 221 (Ga. 1985).

the Supreme Court of Georgia held that Georgia's rape statute, which was silent on marital rape, did not implicitly incorporate the common law exemption. In People v Liberta,[104] the New York Court of Appeals held that the New York rape statute, by protecting married men from prosecution for rape while exposing unmarried and separated men to liability for the same act, violated the equal protection clause of the fourteenth amendment to the United States Constitution. The Court stated that where a statute draws a distinction based upon marital status, the classification must be reasonable and based on some ground of difference that rationally explains the different treatment. Since the Court found that there was "no rational basis for distinguishing between marital and non-marital rape",[105] it held the statute to be unconstitutional.

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104. 474 N.E.2d 567 (N.Y.1984).

105. Ibid., at p. 573, para. 5.

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